Constitutional Court of Bosnia and Herzegovina PARTIAL DECISION PART 3
S a r a j e v o

With respect to Article VI.3 (a) of the Constitution of Bosnia and Herzegovina and Articles 35, 37, 54, 57, 58, 59, and 71 of its Rules of Procedure, the Constitutional Court of Bosnia and Herzegovina, at its session held on 30 June and 1 July 2000, adopted the following

PARTIAL DECISION

A. Regarding the Constitution of the Republika Srpska:

The Constitutional Court declares the following provisions or parts of provisions unconstitutional:

a) Paragraphs 1, 2, 3 and 5 of the Preamble, as amended by Amendments XXVI and LIV

b) The wording *a State of the Serb people and* of Article 1, as modified by Amendment XLIV.

B. Regarding the Constitution of the Federation of Bosnia and Herzegovina

The Constitutional Court declares the following parts of provisions unconstitutional:

a) The wording *Bosniacs and Croats as constituent peoples, along with Others, and* as well as *»in the exercise of their sovereign rights«* of Article I.1 (1), as modified by Amendment III.

The provisions or parts of provisions of the Constitutions of the Republika Srpska and the Federation of Bosnia and Herzegovina, which the Constitutional Court has found to be in contradiction with the Constitution of Bosnia and Herzegovina cease to be in effect as of the date of the publication of this Decision in "Official Gazette of Bosnia and Herzegovina".

This Decision shall be published in "Official Gazette of Bosnia and Herzegovina", "Official Gazette of the Federation of Bosnia and Herzegovina" and "Official Gazette of the Republika Srpska".

R e a s o n s

I. Proceedings before the Constitutional Court

1. On 12 February 1998, Mr. Alija Izetbegović, at the time Chair of the Presidency of Bosnia and Herzegovina, instituted proceedings before the Constitutional Court for an evaluation of the consistency of the Constitution of the Republika Srpska (hereinafter: the "Constitution of RS") and the Constitution of the Federation of Bosnia and Herzegovina (hereinafter: the "Constitution of the Federation") with the Constitution of Bosnia and Herzegovina (hereinafter: the "Constitution of BiH"). The request was supplemented on 30 March 1998 when the applicant specified which provisions of the Entities' Constitutions he considered to be unconstitutional.

The applicant requested that the Constitutional Court review the following provisions of the Entities' Constitutions:

A. Regarding the Constitution of RS:

a) The Preamble to the extent that it refers to the right of the Serb people to self-determination, the respect for their struggle for freedom and State independence, and the will and determination to link their State with other States of the Serb people;

b) Article 1 which provides that the Republika Srpska is a State of the Serb people and of all its citizens;

c) Article 2, paragraph 2 to the extent that it refers to the border between the Republika Srpska and the Federation;

d) Article 4,which provides that the Republika Srpska may establish special parallel relationships with the Federal Republic of Yugoslavia and its Member Republics, and Article 68, paragraph 1 which, under item 16, provides that the Republika Srpska shall regulate and ensure co-operation with the Serb people outside the Republic;

e) Article 6, paragraph 2 to the extent that it provides that a citizen of the Republika Srpska cannot be extradited;

f) Article 7 to the extent that it refers to the Serbian language and Cyrillic alphabet as the official language;

g) Article 28, paragraph 4 which provides for material State support of the Orthodox Church and cooperation between the State and the Orthodox Church in all fields, in particular for the preservation, fostering, and development of cultural, traditional and other spiritual values;

h) Article 44, paragraph 2 which provides that foreign citizens and stateless persons may be granted asylum in the Republika Srpska;

i) Amendment LVII, item 1 which supplements the Chapter on Human Rights and Freedoms and provides that, in the case of differences between the provisions on rights and freedoms in the Constitution of RS and those of the Constitution of BiH, the provisions which are more favourable to the individual shall be applied;

j) Article 58 paragraph 1, Article 68 item 6 and the provisions of Articles 59 and 60 to the extent that they refer to different forms of property, the holders of property rights, and the legal system relating to the use of property;

k) Article 80, as modified by Amendment XL, item 1, which provides that the President of the Republika Srpska shall perform duties related to defence, security, and relations with other States and international organizations, and Article 106, paragraph 2 according to which the President of the Republika Srpska shall appoint, promote, and recall officers of the Army, judges of military courts, and Army prosecutors;

l) Article 80, as modified by Amendments XL and L, item 2 which confers onto the President of the Republika Srpska the power to appoint and recall heads of missions of the Republika Srpska in foreign countries and to propose ambassadors and other international representatives of Bosnia and Herzegovina from the Republika Srpska, as well as Article 90, supplemented by Amendments XLI

and LXII, which confers onto the Government of the Republika Srpska the authority to establish the Republic's missions abroad;

m) Article 98, according to which the Republika Srpska shall have a National Bank, as well as Article 76, paragraph 2 as modified by Amendment XXXVIII, item 1, paragraph 2, which confers onto the National Bank the competence to propose statutes relating to monetary policy; and

n) Article 138, as modified by Amendments LI and LXV, which empowers the authorities of the Republika Srpska to adopt acts and undertake measures for the protection of the Republic's rights and interests against acts of the institutions of Bosnia and Herzegovina or the Federation of BiH.

B. Regarding the Constitution of the Federation:

a) Article I.1 (1) to the extent that it refers to Bosniacs and Croats as being the constituent peoples;

b) Article I.6 (1) to the extent that it refers to Bosnian and Croatian as the official languages of the Federation;

c) Article II.A.5 (c) as modified by Amendment VII, to the extent that it provides for dual citizenship;

d) Article III.1 (a) to the extent that it provides for the authority of the Federation to organize and conduct the defence of the Federation; and

e) Article IV.B.7 (a) and Article IV.B.8 to the extent that they entrust the President of the Federation with the task of appointing heads of diplomatic missions and officers of the military.

2. The request was communicated to the People’s Assembly of the Republika Srpska and the Parliament of the Federation of BiH. On 21 May 1998, the People’s Assembly of the Republika Srpska submitted its views on the request in writing. The House of Representatives of the Parliament of the Federation of BiH submitted its reply on 9 October 1998.

3. In accordance with the Constitutional Court’s decision of 5 June 1998, a public hearing was held in Sarajevo on 15 October 1998, at which representatives and experts of the applicant and the House of Representatives of the Federation presented their views on the case. The public hearing proceeded in Banja Luka on 23 January 1999. The applicant was represented by: Prof. Dr. Kasim Trnka and an expert, Džemil Sabrihafizović; the House of Representatives of the Federation by Enver Kreso and an expert, Sead Hodžić; the House of Peoples of the Federation by Mato Zovko and an expert, Ivan Bender; and the People’s Assembly of the Republika Srpska by Prof. Dr. Radomir Lukić and an expert, Prof. Dr. Petar Kunić. On that occasion, arguments were presented by the representatives and experts of the applicant, the House of Representatives, and the House of Peoples of the Federation as well as the People’s Assembly of the Republika Srpska

4. Discussions on the case took place at the following sessions of the Court: on 25 and 26 February 1999, 7 and 8 June 1999, 13 and 14 August 1999, 24 and 25 September 1999, and on 5 and 6 November 1999. At the session held on 3 and 4 December 1999, the Court concluded that at the following session they would deliberate and vote on the case based on the prepared Draft Decision.

5. At its session held on 29 and 30 January 2000 the Court adopted unanimously a first Partial Decision in the case ("Official Gazette of Bosnia and Herzegovina", No. 11/00; "Official Gazette of the Federation of Bosnia and Herzegovina", No. 15/00 and "Official Gazette of the Republika Srpska", No. 12/00).

6. At its session of 18 and 19 February 2000 the Court adopted a second Partial Decision in the case ("Official Gazette of Bosnia and Herzegovina", No. 17/00; "Official Gazette of the Federation of Bosnia and Herzegovina", No. 26/00 and "Official Gazette of the Republika Srpska", No. /00). According to the Court's Decision of 5 May 2000, the public hearing was reopened in Sarajevo on 29 June 2000 on the remaining part of this case. Prof. Dr. Kasim Trnka and an expert Džemil Sabrihafizović represented the applicant, Mr. Enver Kreso, and a legal expert, Sead Hodžić, represented the House of Representatives of the Federation, while Prof. Dr. Radomir Lukić and an expert, Prof. Dr. Petar Kunić, represented the People's Assembly of the Republika Srpska. The representative and the expert of the House of Peoples of the Federation, having been called to take part in accordance with the Court's Rules of Procedure**,** failed to appear at the public hearing. Deliberations were preceded at the session of the Court held on 30 June and 1 July 2000 and votes were cast on the following provisions:

A. Regarding the Constitution of RS

a) The Preamble, as modified by Amendments XXVI and LIV, to the extent that it refers to the right of the Serb people to self-determination, the respect for their struggle for freedom and State independence, and the will and determination to link their State with other States of the Serb people;

b) Article 1, as modified by Amendment XLIV, which provides that the Republika Srpska is a State of the Serb people and of all its citizens;

B. Regarding the Constitution of the Federation

a) Article I.1 (1), as modified by Amendment III, to the extent that it refers to Bosniacs and Croats as being the constituent peoples.

II. Admissibility

9. The Court declared the entire request admissible in its Partial Decision 29 and 30 January 2000 ("Official Gazette of Bosnia and Herzegovina", No. 11/00; "Official Gazette of the Federation of Bosnia and Herzegovina", No. 15/00 and "Official Gazette of Republika Srpska", No. 12/00).

III. Merits

A. Regarding the Constitution of RS

a) The challenged provisions of the Preamble to the Constitution of RS, as amended by Amendments XXVI and LIV, read as follows:

Starting from the natural, inalienable and non-transferable right of the Serb people to self-determination on the basis of which that people, as any other free and sovereign people, independently decides on its political and State status and secures its economic, social and cultural development;

Respecting the centuries-long struggle of the Serb people for freedom and State independence;
Expressing the determination of the Serb people to create its democratic State based on social justice, the rule of law, respect for human dignity, freedom and equality;

[...]

Taking the natural and democratic right, will and determination of the Serb people from the Republika Srpska into account to link its State completely and tightly with other States of the Serb people;

Taking into account the readiness of the Serb people to pledge for peace and friendly relations between peoples and States,

(...)

10. The applicant argued that the quoted provisions of the Preamble did not conform with the last paragraph of the Preamble to the Constitution of BiH, Article II.4, Article II.6, and Article III.3 (b) of the Constitution of BiH since, according to that Constitution, there are three constituent peoples - Bosniacs, Croats and Serbs - who, along with other citizens, exercise their sovereign rights on the entire territory of Bosnia and Herzegovina without being subject to discrimination on any grounds such as, *inter alia*, a People's origin. He also referred to Article 1 of the Constitution of RS in order to support his claim that the Preamble to the Constitution of RS was not in line with the Constitution of BiH. Consequently, in his opinion, it is unjustified to call the Republika Srpska a People's State of only Serb people. In addition, the Republika Srpska could not be called a state "in its full capacity" as it is called an Entity in Article I. 3 of the Constitution of BiH.

11. The People's Assembly of the Republika Srpska principally raised the objection, in its written statement, that the Preamble was not an operative part of the Constitution of RS and had no normative character. The same would hold true for the Preamble of the Constitution of BiH because it was not made a part of the Constitution *stricto sensu* and therefore, had no normative character. In its opinion the text of a preamble could serve only as an auxiliary method of interpreting the constitution of which it is a preface. It may, therefore, not serve as a basis for review of the Constitution of RS. In the course of the public hearings, the representative and expert of the People's Assembly further invoked several scholarly opinions on the normative character of the Preamble of the US Constitution and Hans Kelsen's viewpoint that preambles "usually" fail to determine any specific norms for human conduct and therefore lack any legally relevant contents, being more of an ideological rather than legal character. In addition, it quoted from the Final Arbitration Award for Brcko that the preamble to the General Framework Agreement for Peace (GFAP) "did not itself create a binding obligation" for the parties. *In conclusio*, a preamble fails to contain any normative character as neither individual rights nor specific obligations of the state authorities follow from its text.

12. Furthermore, the Assembly responded in its written statement that there were many provisions in the Constitution of RS which prohibit discrimination and that the term "State" may well be used for a "political-territorial unit" with a constitution and is called a republic. Using the term "State" also in Article 1 of the Constitution of RS would not allude to the independence of the RS. During the course of the public hearings, the representative and expert of the People's Assembly also invoked some articles of the Constitution of BiH in order to prove that the statehood features of the Entities which were attributed by the Constitution itself, such as Article III.3 (a) of

the Constitution of BiH which refers to the "state functions" of the Entities and Article I.7 which refers to "citizenship" of the Entities. Upon questioning, the representative of the People's Assembly reaffirmed that the RS has to be seen as a state not in terms of international but rather constitutional law.

13. Finally, the expert of the People's Assembly of the Republika Srpska argued that the sovereignty of the Entities is an essential characteristic of their statehood and that the Dayton Peace Agreement acknowledged their territorial separation. Moreover, their peoples have a collective right of "self-organization" of their own state so that the Entities could act "according to the decisions taken at the level of joint institutions only if they conform to their own interests". Additionally, the expert of the People's Assembly of the Republika Srpska concluded in the public hearing: "It is evident that the Republika Srpska can be called a state as her statehood is the expression of her original, united, historical People's movement, of her people which has a united ethnic basis and forms an independent system of power in order to live really independently, although an independent entity within the framework of a complex state community".

14. Contrary to these positions, the expert of the House of Representatives of the Federation Parliament outlined at the public hearing that Bosnia and Herzegovina is the only state and no part of the Constitution or any of the Annexes to the GFAP would refer to Entities as other than entities. From the point of view of international law, only BiH was a state, which continued to exist under its name and with "its internal structure modified". Thus, the principle of territorialization of sovereignty, and the right to secession in particular, could not be applied in a multi-ethnic community. Unlike the wording "state functions" in the translation used by the expert of the People's Assembly of the Republika Srpska, the English text of Article III.3 (a) of the Constitution of BiH read "governmental functions". Furthermore, as there are a number of institutions, such as municipalities or notaries, which certainly do not enjoy the attribute of statehood although they exercise governmental powers, it follows that Entities could even exercise "state functions" without being states themselves.

15. The applicant's representative further argued at the public hearing that indeed different positions in constitutional theories exist concerning whether or not the preamble of a constitution has normative character. However, it is beyond dispute that a preamble forms a part of a constitution ***should it include either constitutional principles or clear regulations of certain matters or should the same institution under the same procedure adopt it***. Moreover, he invoked the Decision of the Constitutional Council of the Republic of France of 16 June 1971, according to which the provisions of the Preamble of the French Constitution did have a normative and binding character.

16. In response to the applicant's statement, the representatives of the People's Assembly of the Republika Srpska pointed out that this example is the only exception to the general rule that a Preamble does not form part of a constitution as the French Constitution does not include provisions on human rights and freedoms in the normative part of the Constitution and the preamble thus, by referring to the French Declaration of the Rights of Man and Citizens, incorporates those provisions into the Constitution. The Preamble of the Constitution of BiH, however, would – neither in form nor substance – meet the requirements of legal norms and could thus never serve as a constitutional basis to review the Entities' Constitutions.

<u>The Constitutional Court finds:</u>

17. As far as the normative character of preambles of constitutions is concerned, two closely linked issues were raised by the objections of the representatives of the People's Assembly of the Republika Srpska in their conclusion that this Court fails to have the jurisdiction to review both the Preamble of the RS Constititution and other provisions of the Constitutions of the Entities in light of the text of the Preamble of the Constitution of BiH: firstly, whether a preamble, which is not included in the "normative" part of the constitution, becomes an "integral" part of the text of that constitution and secondly, whether it may have normative character at all as the language of a preamble would not determine rights or obligations.

18. As far as the scholarly opinions on the legal nature of preambles of constitutions in general are concerned (which were quoted by the representatives of the parties *in abstracto*), it is certainly not the task of this Court to decide on such scientific debates, but to restrain itself to the judicial adjudication of the dispute pending before it. Hence, the Constitutional Court must decide on the basis of the Constitution of BiH and its context within the GFAP. In this regard, the Court is not convinced by the reference of the representatives of the People's Assembly to the Brcko Arbitration Award. It is true that the reasons of the Tribunal commence at Paragraph 82 with the wording "that the language of the preamble to the GFAP, however, did not itself create a binding obligation; ..." Nevertheless, the argument went on to state that the "parties' obligations have been brought forth in the context of the GFAP, which modified the 51:49 principle (by including a slightly different distribution) and left unresolved the territorial allocation of the Brock corridor area. That lack of resolution is the reason for this arbitration. In short, the GFAP has ratified neither the prolongation of the control of RS over the disputed area nor the territorial continuity for the RS".

Seen from the context of the entire argumentation, the commitment to certain pre-Dayton "Agreed Basic Principles" in the Preamble to the GFAP does not create specific obligations of the parties as this was left to the arbitration according to Annex II to the GFAP, it is therefore simply an overgeneralization by the party in this dispute before the Constitutional Court to conclude that a Preamble or even the Preamble to the GFAP has no normative force as such.

19. Contrary to the constitutions of many other countries, the Constitution of BiH in Annex 4 to the Dayton Agreement is an integral part of an international agreement. Therefore, Article 31 of the Vienna Convention of the Law on Treaties – providing for a general principle of international law which is, according to Article III.3 (b) of the Constitution of BiH, an "integral part of the legal system of Bosnia and Herzegovina and its Entities" – must be applied in the interpretation of all its provisions, including the Constitution of BiH. The relevant provisions of this Article read as follows:

Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text and including its preamble and annexes:

(a) Any agreement relating to the treaty that was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument that was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

[...]

According to the wording of paragraph 2 of that Article, the text that is interpreted includes the preamble and annexes. Hence, the Preamble of the Constitution of BiH must be viewed as an integral part of the text of the Constitution.

20. The same holds true for the Preamble of the Constitution of RS but for another reason, as the text of the Preamble of the Constitution of RS was modified by Amendments XXVI and LIV ("Official Gazette of the RS", Nos. 28/94 and No. 21/96) whereby it was *expressis verbis* stated that "these amendments form an integral part of the Constitution of the Republika Srpska..."

21. It is, by the way, also a circular reference in the argumentation of the representatives of the RS People's Assembly that the text of a preamble is not an "integral part" of the respective constitution with the underlying assumption that it has no "normative" character since it is separated from the "normative" part of the constitution. The entire issue is thus reduced to the problem of the normative character of constitutional provisions as such.

22. Previously in Partial Decision I of the case, at para. 10 ("Official Gazette of Bosnia and Herzegovina", No. 11/00, "Official Gazette of the Federation of Bosnia and Herzegovina", No. 15/00 and "Official Gazette of Republika Srpska", No. 12/00) the Constitutional Court found that its power of judicial review did not depend on the number of challenged provisions, nor that there is any normative difference between the provisions and "fundamental principles" of the Constitution.

23. What is, however, the "nature" of constitutional principles to be found both in the provisions of the preamble and the so-called "normative part" of a constitution? As the Canadian Supreme Court held in "Reference re Secession of Quebec" [1998], 2.S.C.R. at paragraphs 49 through 54, "these principles inform and sustain the constitutional text: they are the vital unsaid assumptions upon which the text is based.... Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by an oblique reference in the preamble to the Constitution Act, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood. [...] The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions". Thus, "the principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments". In addition to answering the rhetorical question what use the Supreme Court may make of these underlying principles incorporated into the Constitution by the Preamble, the Court reaffirmed its position held in Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997], 3.S.C.R.3, at para. 95: "As such, the Preamble is not only a key to construing the express provisions of the Constitution Act, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law".

24. Finally, by referring to the principle of the "promotion of a market economy" according to paragraph 4 of the Preamble to the Constitution of BiH, this Constitutional Court also held in Partial Decision II of the case at hand, at para. 13 ("Official Gazette of Bosnia and Herzegovina", No. 17/00, "Official Gazette of the Federation of Bosnia and Herzegovina", No. 26/00 and "Official

Gazette of the Republika Srpska", No. /00), that the Constitution of BiH contains "basic constitutional principles and goals for the functioning of Bosnia and Herzegovina which must be viewed as constitutional guidelines or restrictions for the exercise of the responsibilities of both Bosnia and Herzegovina and its Entities". Furthermore, previously in case U 1/98 ("Official Gazette of Bosnia and Herzegovina", No. 22/98) the Court concluded from the first sentence of Article VI.3 of the Constitution of BiH – that the Constitutional Court shall uphold this Constitution – the principle of efficiency of the entire text of the Constitution which must therefore also apply to the Preamble. Hence, the "normative meaning" of the Preamble of the Constitution of BiH cannot be reduced to an "auxiliary method" in the interpretation of that very same Constitution.
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25. *In conclusio*, it cannot be said thus in abstract terms that a preamble as such has no normative character. This argument of the parties' representatives is therefore not a sound argument to challenge the responsibility of the Constitutional Court to review the constitutions of the Entities in light of the text of the Preamble of the Constitution of BiH.

26. As any provision of an Entity's constitution must be consistent with the Constitution of BiH, including its Preamble, the provisions of the Preamble are thus a legal basis for reviewing all normative acts lower in rank in relation to the Constitution of BiH for as long as the aforesaid Preamble contains constitutional principles delineating – in the words of the Canadian Supreme Court – spheres of jurisdiction, the scope of rights or obligations, or the role of the political institutions. The provisions of the preamble are therefore not merely descriptive, but are also invested with a powerful normative force thereby serving as a sound standard of judicial review for the Constitutional Court. Hence, the Constitutional Court must establish *in substance* what specific rights or obligations follow from the constitutional principles of the Preambles of both the Constitution of BiH and the Constitution of RS.

27. The Constitutional Court notes that the Preamble of the Constitution of RS, as amended after the Dayton Agreement had been signed, refers to the "inalienable right of the Serb people to self-determination" in order to decide "independently" on its political and "State status" in paragraph 1, to "State independence" in paragraph 2, to "creation of its democratic State" in paragraph 3 and to a "democratic right, will and determination of the Serb people from the Republika Srpska to link its State completely and closely with other States of the Serb people" in paragraph 5. Speaking in explicit terms of a "right of the Serb people" and of "state status" and "independence" of the RS, the Court cannot see that the text of the Preamble of the Constitution of RS is of a merely descriptive character as these constitutional provisions, taken in conjunction with Article 1 of the Constitution of RS, evidently establish collective rights and the political status of the Republika Srpska.

28. Moreover, regarding the question of whether Entities can be called states due to their sovereignty, as the expert of the People's Assembly of the Republika Srpska has outlined, the Court finds that the existence of a constitution, the name "Republic" or citizenship are not *per se* proof of the existence of statehood. Although it is also quite often the case in federal states that their component entities do have a constitution, and that they might even be called a republic or grant citizenship, all these institutional elements are granted or guaranteed by a federal constitution. The same holds true for Bosnia and Herzegovina.

29. Article I.1 of the Constitution of BiH undoubtedly establishes the fact that only Bosnia and Herzegovina continues "its legal existence under international law as a state, with its internal structures modified as provided herein". In consequence, Article I.3 establishes two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska as component parts of the state of

Bosnia and Herzegovina. In addition, as seen from Article III.2 (a) of the Constitution of BiH for instance, the Entities are subject to the sovereignty of Bosnia and Herzegovina. Despite examples of component units of federal states, which are also called states themselves, in the case of Bosnia and Herzegovina it is thus clear that the Constitution of BiH did not recognize the Republika Srpska and the Federation of Bosnia and Herzegovina as "states" but instead refers to them as "Entities".

30. Hence, contrary to the assertions of the representatives of the People's Assembly of the Republika Srpska, the Constitution of BiH does not leave room for any "sovereignty" of the Entities or a right to "self-organization" based on the idea of "territorial separation". Citizenship of the Entities is thus granted by Article I.7 of the Constitution of BiH and is not proof of their "sovereign" statehood. In the same manner, "governmental functions", according to Article III.3 (a) of the Constitution of BiH, are thereby allocated either to the joint institutions or to the Entities so that their powers are in no way an expression of their statehood, but are derived from this allocation of powers through the Constitution of BiH.

31. The idea of a collective right to "self-organization", so that "decisions taken at the level of the joint institutions" must be administered "only in the event they conform to the interests of the Entities", does not conform either to the legislative history nor the text of the Dayton Constitution. In addition, the claim of the expert of the People's Assembly of the Republika Srpska that the Republika Srpska could be called a state because of a "historic people's movement of its nation with a uniform ethnic basis and forming an independent system of power" must be taken as proof that the challenged provisions of the Preamble of the Constitution of RS, taken in conjunction with the wording of Article 1, do "aim at the independence of the RS". This idea is evident, in particular, also from the language of Item 8 of the "Declaration on Equality and Independence of the Republika Srpska" of the People's Assembly of the Republika Srpska on 17 November 1997 ("Official Gazette of the Republika Srpska", No. 30/97):

*8. **The People's Assembly of the Republika Srpska stresses again its determination** to contribute in every way, on the basis of the Agreement on Special and Parallel Relations between the **FR Yugoslavia and the Republika Srpska**, to the strengthening of the relations of the Serb people from the two sides of the river Drina, and **to its final union**.*

*The People's Assembly hereby warns about the creation of alliances of such forces in the Republika Srpska and in Yugoslavia that are in favour of the further dismembering of Yugoslavia and disintegration of the Republika Srpska, which never supported this Agreement, and which must be identified by the people. Their goal is never to see the **Republika Srpska and Yugoslavia united into one state**, to leave the Serb people eternally disunited and divided into regions of some kind, separated from the orthodox religion and our traditional, spiritual and historic values. Their goal is to assimilate the Republika Srpska into a unitary BiH.*
(...)

(*Emphasis added*)

The quotation of this paragraph in full length reveals the obvious context of this passage of the Declaration of the People's Assembly of the Republika Srpska, namely the power play between the two fractions of the SDS at that time. Nevertheless, this is an official act of the legislative organ of the RS, which, in particular through this indirect manner, clearly reflects the intent of the legislative body. It could be argued, of course, that this intent must be seen in light of the power play at that specific time. However, this official act of the People's Assembly of the Republika Srpska, published in the Official Gazette of the Republika Srpska, was never formally declared null and

void nor renounced in any other way by the newly elected Assemblies until the decision of this Court and can therefore serve as proof for the »intent« of the legislative body of the Republika Srpska with which the text of the Preamble of the Constitution of RS must be interpreted.

32. The Constitutional Court thus finds that all the references in the provisions of the Preamble of the Constitution of RS to sovereignty, independent decision-making, state status, state independence, creation of a state, and complete and close linking of the RS with other States of the Serb people violate Article I.1 taken in conjunction with Article I.3, Article III.2 (a), and Article 5 of the Constitution of BiH which provide for the sovereignty, territorial integrity, political independence, and international personality of Bosnia and Herzegovina. Therefore, it is not necessary for the Court, in this context, to review the challenged provisions of the Preamble of the Constitution of RS in light of the text of the Preamble of the Constitution of BiH, in particular the paragraph referring to Bosniacs, Croats and Serbs as constituent peoples.

33. The Constitutional Court thus declares unconstitutional paragraphs 1, 2, 3, and 5 of the Preamble of the Constitution of RS.

b) The challenged provision of **Article 1 of the Constitution of RS** in the wording of Amendment XLIV reads as follows:

The Republika Srpska shall be the State of the Serb people and of all its citizens.

34. The applicant argued that the said provision was not in line with the last paragraph of the Preamble of the Constitution of BiH and with Article II.4 and Article II.6 of the Constitution of BiH. He contended that, according to the said provisions of the Constitution of BiH, all three peoples (namely Bosniacs, Croats and Serbs) were the constituent peoples of the entire territory of BiH. Consequently, the RS could not be established as a state of only one people - the Serb people. Moreover, today's functioning of the RS on that basis, i.e. as a ”belonging-exclusively-to-one-people” power, would prevent the realization of the fundamental rights of all displaced persons to return to their homes of origin in order to restore the structure of population which had been disturbed by war and ethnic cleansing.

Arguments of the Parties concerning the question of whether Bosniacs, Croats and Serbs have to also be considered constituent peoples at the level of the Entities:

Arguments regarding the vague meaning of the term “constituent people” and historical interpretation:

35. With respect to the meaning of signing Annex IV to the Framework Agreement by the representative of the Federation of BiH “in the name of its constituent peoples and citizens”, the expert of the applicant argued that the previous existence of the Washington Agreement had established the constituent status of Bosniacs and Croats on the territory of the Federation. The formula given by the declaration was a result of the wish to secure by this signature the legal continuity of the constituent peoples from the Washington to the Dayton Agreement.

36. The applicant’s representative further supported, at the public hearing, the claim that all three peoples must be constituent on the entire territory of BiH with the fact that “the statehood of BiH had always been founded on the equality of peoples, religions, cultures and citizens which have been traditionally living on this territory”. Throughout the entire history of BiH, ethnic criteria had never been applied to organize the state structure, nor had territories been an element of the

constitutional order. According to the last census of 1991 a multi-ethnic society existed across the entire territory of BiH.

37. The expert of the House of Peoples of the Federation Parliament argued, at the public hearing, that, in the arbitration process, the international community certainly had the existence of three constituent peoples in mind and that the constituent status was determined in the way it is written in the respective constitutions. When drafting the Washington Agreement and the Constitution of BiH, there was no intention to define a third constituent people in the Federation. If someone had wanted to establish the constituent status of three peoples in the Entities, the name of the RS would have already presented an obstacle.

38. The representative of the People's Assembly of the Republika Srpska stated at the public hearing that it was of useless to discuss the constituent status insofar as it was not established anywhere in the normative part of the Constitution as a legal principle or a norm. He stressed that the right to collective equality, which the applicant derived from the term "constituent people", is mentioned nowhere in the human rights documents.

39. Furthermore, he raised the objection that the last sentence of the Preamble of the Constitution of BiH did not literally state that Bosniacs, Croats and Serbs are constituent on the entire territory of BiH. By adding the wording "on the entire territory", the meaning of the entire sentence was significantly changed. In his opinion, the constituent status of one or two peoples in one Entity did not mean that they were not constituent in Bosnia and Herzegovina but rather the other way round: "If one people are constituent in one of the Entities, then it is constituent in Bosnia and Herzegovina also, insofar as the Entities form the territory of BiH". However, nowhere in the Constitution could a provision be found that all peoples are constituent in the Entities.

40. Moreover, this interpretation could "never be the case" if the adoption procedure of the Constitution of BiH was taken into consideration as well as the process of creating the Entities as special territorial units within the framework of BiH. The re-establishment of joint state structures, in his opinion, occurred first between two constituent peoples, the Bosniacs and the Croats who created the Federation of BiH by the Washington Agreement of 1994 and whose Constitution explicitly mentions that only Bosniacs and Croats are constituent in this community, whereas the Republika Srpska remained apart until September 1995. The RS then took part in New York and Geneva as an equal participant when the basic principles on the future state community were determined. On that occasion, the existence of the Republika Srpska was recognized by the statement that it would continue to exist in conformity with today's Constitution on the condition of amendment to conform to the stated principles. Finally, the Dayton Agreement was concluded by representatives of the former Bosnia and Herzegovina, the Federation of BiH, and the Republika Srpska. It was signed on behalf of the Federation by an authorized person with the formula, that "the Federation of BiH adopts the Constitution of BiH in Annex 4 to the General Agreement in the name of her constituent peoples and citizens". It thus followed in the opinion of the expert of the People's Assembly "beyond doubt that the Serb people was constituent only in the RS" given that they were not mentioned in the Constitution of the Federation. Therefore, the last sentence of the Preamble of the Constitution of BiH means beyond a doubt that Serbs, Bosniacs, Croats and other citizens are constituent at the level of Bosnia and Herzegovina when they decide on matters within the competence of the joint institutions which had, by consensus of the Entities, been allocated to them through the Constitution of BiH, but not when they decide on the original responsibilities of the Entities. Therefore, it is obvious that Bosniacs and Croats were not constituent in the RS, whereas Serbs were not constituent in the Federation of BiH.

Arguments relating to the institutional structures of the joint institutions of BiH

41. According to the written statement of the People's Assembly of the Republika Srpska, the Constitution of BiH itself establishes the RS as the electoral unit for the Serb member of the Presidency and for the five Serb delegates to the House of Peoples of the Parliamentary Assembly of BiH. These provisions guarantee the equality of Serbs in relation to the other two nations, whose representatives in the same bodies are elected from the Federation of BiH and not from the RS.

42. In response to this statement, the representatives of the applicant and the House of Representatives of the Federation Parliament contended that exactly those provisions of the Constitution of BiH guarantee the constituent status and thereby the equality of all three peoples on the entire territory of BiH since they are equally represented in those institutions whose power is exercised on the entire territory of BiH. However, the electoral mechanisms for these institutions were of a technical nature only.

Arguments relating to the interpretation of the "authentic text" of Article 1 of the Constitution of RS

43. The expert of the People's Assembly raised the objection at the public hearing that the text of Article 1 of the Constitution of RS neither defined the Serb people as constituent nor did it determine that the RS was a state of only the Serb people, but that the authentic text would read quite differently, namely "the Republika Srpska is the State of the Serb people and all other citizens". In contrast to the allegations made by the applicant, the text of the challenged provision would thus have a different meaning.

44. On the question whether the definition of Article 1 of the Constitution of RS could be viewed as a compromise formula in the conflict between individual rights and group rights, the applicant's representative replied that the term *"konstitutivnost"* was broader than individual rights of members of a people but narrower than sovereignty. Sovereignty would require exclusive power on a certain territory including the right to self-determination and secession. According to the representative's view, however, it was impossible to exercise the principle of territorialisation of sovereignty or the right to secession in a multi-ethnic community such as Bosnia, particularly with respect to the high degree of balance and mixture of the structure of peoples. Consequently, the term *"konstitutivnost"* would rather guarantee the collective rights of peoples and full equality between them.

Arguments relating to the function of the Dayton Agreement

45. The representative of the applicant argued at the public hearing that it was not a coincidence that the provision of the Constitution of BiH, which followed the provision on the state structure of Bosnia and Herzegovina (Article I), demanded that both Bosnia and Herzegovina and its Entities "shall ensure the highest level of internationally recognized human rights and fundamental freedoms" (Article II). Long-lasting stabilization in this region was thus precisely constructed on the respect for human rights and freedoms.

46. The representative of the House of Peoples of the Federation Parliament repeated his objections regarding the admissibility of the present request also in relation to the function of the

Dayton Peace Agreement. He stated that a review of the Constitutions of the Federation of BiH and the RS would lead to a total revision of the Dayton Agreement. The basic goal of the GFAP in its present form, which has been accepted both by the RS and the Federation of BiH, was in fact to secure peace in this region. Furthermore, he concluded: "The constituent status of all three peoples in both Entities would return Bosnia and Herzegovina to its position in 1991 when all of them had been constituent according to the former Constitution of BiH. It is not necessary to repeat how this ended ... The applicant seems to forget what has happened in BiH during the eight years which have passed since".

Arguments of the Parties relating to the question whether Article 1 of the Constitution of RS results in discrimination in the enjoyment of individual rights

47. During the course of the public hearing, the representatives of the applicant further argued that Article 1 distinguished members of the Serb people and citizens, thereby creating two distinct categories of persons. This distinction would lead to an "automatic exclusion" of non-Serb persons. Moreover, the resulting privileged position of the Serb people according to Article 1, the Constitution of RS would then "reserve" certain rights for members of the Serb people only, namely the right to self-determination, the cooperation with the Serb people outside the RS, the privileged position of the Orthodox Church, and the "exclusive right" to use the Serbian language officially although the equality of languages in the institutions of BiH would be a minimum standard so that everything below that standard would imply discrimination. This fact in addition to the ethnically uniform executive power of the RS – for which Article 1 would provide the legal basis – would prevent the return of displaced persons and the restoration of property as well as the restoration of a multi-ethnic society. In particular, the return of refugees is seen by the representatives of the applicant not only as an individual right, but also as an essential element of the constitutional order with the goal of re-establishing the multi-ethnic composition of the population in accordance with the 1991 census prior to the outbreak of the war.

48. The representatives of the People's Assembly of the Republika Srpska argued at the public hearing that individual equality was guaranteed by a number of provisions of the Constitution of RS such as Articles 10, 16, 19, 33, 34, 45 and 48 and, with particular regard to Article II.6 of the Constitution of BiH, that Article 1 of the Constitution of RS would certainly not prohibit the enjoyment of human rights as required by the quoted Article of the Constitution of BiH. In conclusion, no provision of the Constitution of RS would prevent any non-Serb citizen from enjoying all his rights equally nor would there be any provision preventing a non-Serb from holding a public office on the grounds of his national origin.

49. Furthermore, the representatives of the People's Assembly of the Republika Srpska reminded the parties of the text of Article 1 of the Constitution of RS, contending that precisely the compromise formula would ensure that every non-Serb was equal and also that in actual fact non-Serb persons could take part in the executive power. As far as the return of refugees is concerned, the expert of the People's Assembly argued that the entire history of the RS has to be taken into account and that the return of refugees was a much more complex problem (including the social and economic conditions) and consequently that this problem could not be reduced to a question of discrimination against citizens of non-Serb origin.

The Constitutional Court finds:

50. As far as the "customary meaning" (Article 31, para.1 of the Vienna Convention of the Law on Treaties) of the term "constituent people" is concerned, the Court finds that it has been

established - as argued by the representatives of the People's Assembly of the Republika Srpska - that there is neither a definition for the term "constituent peoples" under the Constitution of BiH nor that the Preamble's last sentence *expressis verbis* includes the phrase "on the entire territory".

51. However, with respect to the question, previously elaborated by the Court (para. 23. to 26.), whether the last line of the Preamble, in particular the designation of "Bosniacs, Croats and Serbs, as constituent peoples (along with Others)" contains a constitutional principle in conjunction with other provisions, which might serve as a standard of review, the Court finds:

52. However vague the language of the Preamble of the Constitution of BiH may be due to this lack of definition of the status of Bosniacs, Croats, and Serbs as constituent peoples, it clearly designates all of them as constituent peoples, i.e. as peoples. Furthermore, Article II.4 of the Constitution prohibits discrimination on any grounds such as, *inter alia*, association with a national minority and presupposes, thereby, the existence of groups conceived as national minorities.

53. Taken in conjunction with Article I of the Constitution, the text of the Constitution of BiH thus distinctly distinguishes constituent peoples from national minorities with the intention of affirming the continuity of Bosnia and Herzegovina as a democratic multi-ethnic state that, by the way, remained undisputed by the parties. The question thus raised, in terms of constitutional law and doctrine, is what concept of a multi-ethnic state is pursued by the Constitution of BiH in the context of the entire GFAP and, in particular, whether the Dayton Agreement with its territorial delimitation through the establishment of two Entities also recognized a territorial separation of the constituent peoples as argued by the RS representatives?

54. First and foremost, Article I.2 of the Constitution of BiH determines that Bosnia and Herzegovina shall be a democratic state, which is then further specified by the commitment in paragraph 3 of the Preamble "that democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society". This constitutional commitment, legally binding on all public authorities, cannot be isolated from other elements of the Constitution, in particular the ethnic structures, and must therefore be interpreted by reference to the structure of the Constitution as a whole (see Canadian Supreme Court "Reference re Secession of Quebec" (1998), 2.S.C.R., para 50). Therefore, the elements of a democratic state and society and the underlying assumptions – pluralism, fair procedures, peaceful relations following from the text of the Constitution – must serve as a guideline to further elaborate the question concerning how BiH is structured as a democratic multi-ethnic state.

55. It is not by chance that the Canadian Supreme Court found in the case "Reference re Secession of Quebec", (1998), 2.S.C.R., at para. 64 that the Court must be guided by the values and principles essential to a free and democratic society which embodies, *inter alia*, respect for the inherent dignity of the human person, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. Moreover, it is a generally recognized principle, derived from the list of international instruments in Annex I to the Constitution of BiH, that a government must represent the whole people belonging to the territory without distinction of any kind, thereby prohibiting – in particular according to Article 15 of the Framework Convention on the Protection of National Minorities which is incorporated into the Constitution of BiH through Annex I – a more or less complete blockage of effective participation in decision-making processes. Since effective participation of ethnic groups is an important element of democratic institutional structures in a multi-ethnic state, democratic decision-making would be transformed into ethnic domination of one or even more groups if, for instance, absolute and/or unlimited veto-power

would be granted to them, thereby enabling a numerical minority represented in governmental institutions to forever enforce its will on the majority.

56. *In conclusio*, it follows from established constitutional doctrine of democratic states that a democratic government requires – beside effective participation without any form of discrimination – a compromise. It must be concluded that under the circumstances of a multi-ethnic state that representation and participation in governmental structures – not only as a right of individuals belonging to certain ethnic groups, but also of ethnic groups as such in terms of collective rights – does not violate the underlying assumptions of a democratic state.

57. In addition, it must be concluded from the texts and underlying spirit of the International Convention on the Elimination of All Forms of Racial Discrimination, the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities that not only in the states of one majority people, but also in the context of a multi-ethnic state such as BiH, the accommodation of cultures and ethnic groups prohibits not only their assimilation but also their segregation. Thus, segregation is, in principle, an illegitimate aim in a democratic society. There is no question therefore that ethnic separation through territorial delimitation does not meet the standards of a democratic state and pluralist society as established by Article I.2 of the Constitution of BiH taken in conjunction with paragraph 3 of the Preamble. Territorial delimitation thus must not serve as an instrument of ethnic segregation, but – quite to the contrary – must provide for ethnic accommodation through preserving linguistic pluralism and peace in order to contribute to the integration of state and society as such.

58. The differentiation of collective equality as a legal notion and a minority position as a matter of fact is also reflected in the explanatory report of the European Charter for Regional or Minority Languages, which must be applied in BiH in accordance with Annex I to the Constitution of BiH. Although Article 1 of the Charter clearly distinguishes official languages from minority languages, the explanatory report under the heading of "Basic concepts and approaches" outlines at para. 18 that the term "minority" referred to situations in which the language was spoken either by persons who were not concentrated on a specific part of the territory of a state or by a group of persons, which, though concentrated on part of the territory of the state, was numerically smaller than the population in this region which spoke the majority language of the state: "Both cases therefore refer to factual criteria and not to legal notions".

59. Even if the constituent peoples are, in actual fact, in a majority or minority position in the Entities, the express recognition of Bosniacs, Croats, and Serbs as constituent peoples by the Constitution of BiH can only mean that none of them is constitutionally recognized as a majority or, in other words, that they enjoy equality as groups. It must therefore be concluded, in the same way that the Swiss Supreme Court derived from the recognition of the national languages an obligation of the Cantons not to suppress these language groups, that the recognition of the constituent peoples and its underlying constitutional principle of collective equality poses an obligation on the Entities not to discriminate in particular against these constituent peoples which are, in actual fact, in a minority position in the respective Entity. Hence, there is not only a clear constitutional obligation not to violate individual rights in a discriminatory manner which obviously follows from Article II.3 and 4 of the Constitution of BiH, but also a constitutional obligation of non-discrimination in terms of a group right if, for instance, one or two of the constituent peoples are given special preferential treatment through the legal system of the Entities.

60. *In conclusio*, the constitutional principle of collective equality of constituent peoples following from the designation of Bosniacs, Croats and Serbs as constituent peoples prohibits any

special privilege for one or two of these peoples, any domination in governmental structures, or any ethnic homogenisation through segregation based on territorial separation.

61. It is beyond doubt that the Federation of Bosnia and Herzegovina and the Republika Srpska were – in the words of the Dayton Agreement on Implementing the Federation, signed in Dayton on 10 November 1995 – recognized as "constituent Entities" of Bosnia and Herzegovina by the GFAP, in particular through Article I.3 of the Constitution. But this recognition does not give them *carte blanche*! Hence, despite the territorial delimitation of Bosnia and Herzegovina by the establishment of the two Entities, this territorial delimitation cannot serve as a constitutional legitimacy for ethnic domination, national homogenisation, or a right to uphold the effects of ethnic cleansing.

62. Moreover, contrary to the arguments of the representatives of the People's Assembly of the Republika Srpska and the House of Peoples of the Federation, the legislative history and the text of the Dayton Constitution obviously show that the existing Constitutions of the Entities had not been accepted as such without considering the necessity of amendments. It was stated in the Agreed Basic Principles of Geneva, 8 September 1995, under paragraph 2, sub-paragraph 2 that "Each Entity will continue to exist under its present constitution", however, "as amended to accommodate these basic principles". In addition, this principle was further elaborated in the constitutional system of Dayton in the supremacy clause of Article III.3 (b) – according to which "the Entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities, (...)" – as well as the obligation of the Entities, according to Article XII paragraph 2 that "Within three months from the entry into force of this Constitution, the Entities shall amend their respective constitutions to ensure their conformity with this Constitution in accordance with Article III.3 (b)".

63. In addition, insofar as the term "constituent peoples" was inserted into the draft text of the Dayton Constitution only at a later stage of the negotiations, it must, therefore, be concluded that the adopters of the Dayton Constitution would not have designated Bosniacs, Croats, and Serbs as constituent peoples in marked contrast to the constitutional category of a national minority if they had wanted to leave them in such a minority position in the respective Entities as they had, in fact, obviously been situated at the time of the conclusion of the Dayton Agreement, as can be seen from the figures presented below. Had the adopters of the Constitution recognized this fact, they would not have inserted their designation as constituent peoples with the underlying assumption of their collective equality or they would have omitted the phrase of constituent peoples altogether, insofar as the provisions on the ethnic composition of the joint institutions of BiH refer to Bosniacs, Croats, and Serbs directly and do not need an additional designation as "constituent" peoples. Again this designation in the Preamble must thus be viewed as an overarching principle of the Constitution of BiH with which the Entities, according to Article III.3 (b) of the Constitution of BiH, must fully comply.

64. **Regarding the institutional structures of the joint institutions of BiH,** the Court does not share the views of the representatives of the People's Assembly of the Republika Srpska and the House of Peoples of the Federation that the provisions of the Constitution of BiH (concerning the composition of the two Houses of the Parliamentary Assembly of BiH, the Presidency, the Council of Ministers and the Constitutional Court as well as the respective electoral mechanisms) allow for the general conclusion that these representation mechanisms reflect the territorial separation of the constituent peoples in the Entities.

65. A strict identification of territory and certain ethnically defined members of joint institutions of BiH in order to represent certain constituent peoples is not even accurate with respect to the rules

on the composition of the Presidency as laid down in Article V, first paragraph: "The Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska". It must not be forgotten that the Serb Member of the Presidency, for instance, is not only elected by voters of the Serb ethnic origin, but by all citizens of the Republika Srpska with or without a specific ethnic affiliation. He thus represents neither the Republika Srpska as an Entity nor the Serb people only, but all the citizens of the Republika Srpska electoral unit. The same also holds for the Bosniac and Croat Members to be elected from the Federation.

66. In a similar manner, but in no way identical, Article IV.1 of the Constitution of BiH provides that the House of Peoples shall consist of 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs) to be "elected" (sic!), according to sub-item (a), by the Croat and Bosniac Delegates to the House of Peoples of the Federation, whereas the Delegates from the Republika Srpska shall be elected by the People's Assembly of the Republika Srpska. Apart from the distinction that they shall be "elected" by the respective parliamentary bodies of the Entities and not directly elected as Members of the Presidency of BiH by popular vote, the Court finds it striking that the Serb Delegates shall be elected by the People's Assembly, as such, without any differentiation along ethnic lines. Therefore, this provision includes a constitutional guarantee that non-Serb Members of the People's Assembly have the same right as the Serb Members to take part in the election of the five Serb Delegates to the House of Peoples of BiH. Hence, there is no strict uniform model of ethnic representation underlying these provisions of the Constitution of BiH. Had this been the intent of the framers of the Constitution, they would not have regulated these election processes differently.

67. The same conclusions may be drawn from the composition of the House of Representatives of BiH. Again two-thirds, of 42 Members this time, shall be elected from the territory of the Federation and one-third from the territory of the Republika Srpska. However, these provisions do not prescribe the ethnicity of the candidates and there were actually some Bosniac Members who were elected from the territory of the RS and some Serb Members from the territory of the Federation in the last general election of 1998. Insofar as a certain number of Ministers shall be appointed from the territory of the Federation or the RS according to Article V.4 (b), whereas certain Members of the Constitutional Court have to be elected by respective parliamentary bodies of the Entities according to Article VI.1 (a), all these provisions demonstrate nothing but the fact that either the territory or specific institutions of the Entities serve as the legal point of reference for the election of members of the institutions of BiH. This fact is again evident for the Ministers who are finally elected by the House of Representatives of BiH, which certainly does not represent one, two, or even all of three constituent peoples only, but all the citizens of BiH regardless of their national origin.

68. Besides, no provision of the Constitution allows for the conclusion that these special rights for the representation and participation of the constituent peoples in the institutions of BiH may be applied as well for other institutions or procedures. On the contrary, insofar as these special collective rights might violate the non-discrimination provisions, as it shall be shown below, they are legitimised solely by their constitutional rank and therefore, have to be narrowly construed. In particular, it cannot be concluded that the Constitution of BiH provides for a general institutional model, which could be transferred to the Entity level or that similar, ethnically-defined institutional structures on an Entity level, that need not meet the overall binding standard of non-discrimination in accordance with Article II.4 of the Constitution of BiH or the constitutional principle of collective equality of constituent peoples.

69. Of course, it cannot be denied, on the basis of this analysis of the institutional structures of the joint institutions of BiH, that all three constituent peoples are, in somewhat different ways, given special collective rights as far as their representation and participation in the institutions of BiH are concerned. In the final analysis, however, there is certainly no specific model of ethnic representation underlying the provisions on the composition of the institutions and respective electoral mechanisms that would allow for the general conclusion that the Constitution of BiH represents a territorial apportionment of constituent peoples on the level of Entities by regulating the composition of the joint institutions of BiH. Hence, this institutional system surely does not prove or provide a constitutional basis for upholding the territorial apportionment of the constituent peoples on an Entity level.

70. **Regarding the "authentic text" of Article 1 of the Constitution of RS**, the representative of the People's Assembly of the Republika Srpska correctly argued that this provision neither called the Serb people a "constituent people" nor did it define the RS as a "national" state of the Serb people only. The Court finds that this provision indeed contains a compromise formula calling the RS a "state" of the Serb people and of all its citizens – not "Other" (sic!) citizens as the representative had argued at the public hearing, this *lapsus linguae* is sufficiently illustrative of the spirit underlying the challenged provision - thereby using a mixture of ethnic principle and non-ethnic principle for making the exercise of governmental powers and functions of the Entity legitimate. Furthermore, it is true that the Constitution of RS does not *prima facie* provide for any ethnic distinction in the composition of governmental bodies so that the compromise formula of Article 1 in connection with this institutional structure might allow for an equal representation of all citizens.

71. This conclusion, however, uses an incorrect point of comparison insofar as the equality of groups is not the same as the equality of individuals through non-discrimination. Equality of three constituent peoples requires equality of groups as such, whereas the mixture of the ethnic principle with the non-ethnic citizen principle in the compromise formula should avoid special collective rights that violate individual rights by definition. It thus follows that individual non-discrimination does not substitute for equality of groups. Quite the opposite, the regulations of Article 1 of the Constitution of RS, particularly in conjunction with other provisions such as the Rules on the official language under Article 7 of the Constitution of RS and Article 28 paragraph 3 which declares the Serb Orthodox Church to be the Church of the Serb people – thereby creating a constitutional formula of identification of the Serb "state", people and church and putting the Serb people into a privileged position which cannot be legitimised since it is neither at the level of the Republika Srpska nor at the level of Bosnia and Herzegovina in the factual position of an endangered minority which must preserve its existence. The privileged position of the Serb people under Article 1, therefore, violates the explicit designation of constituent peoples under the Constitution of BiH as already outlined above (see supra at para. 52).

72. **Regarding the functional interpretation of the Constitution of BiH**, the Court does not share the views presented by the representatives of the People's Assembly and the House of Peoples that reviewing the Constitutions of the Entities, as requested by the applicant, would lead to a revision of the Dayton Peace Agreement and the status quo of the then existing Federation and RS "in order to preserve peace on these territories". The Court has already pointed out that the Entity Constitutions had not been accepted as such by the Parties to the Agreement (see paragraphs 61. and 62.)

73. Indeed, from a functional point of view, the Dayton Constitution is part of a peace agreement as the name "General Framework Agreement on Peace in Bosnia and Herzegovina"

clearly indicates. Thus, as it may already be seen from the wording of Article VII of the GFAP and paragraph 1 to 3 of the Preamble of the Constitution of BiH, "peaceful relations" are best produced in a "pluralist society" on the basis of the enjoyment of human rights and freedoms and, in particular, through the freedom of all refugees and displaced persons to return to their homes of origin as guaranteed by Article II.5 of the Constitution of BiH. Moreover, this provision also refers explicitly to Annex 7, which in Article I *expressis verbis* states that "the early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina". It therefore follows from the context of all these provisions that it is an overall objective of the Dayton Peace Agreement to provide for the return of refugees and displaced persons to their homes of origin and thereby, to re-establish the multi-ethnic society that had existed prior to the war without any territorial separation that would bear ethnic inclination.

74. In the final analysis, based on the text of the Preamble in connection with the institutional provisions of the Dayton Constitution regarding the legislative history and taking the functions of the entire GFAP – of which the Constitution is a part – into due account, the Constitutional Court finds that Article 1 of the Republika Srpska Constitution violates the constitutional status of Bosniacs and Croats designated to them through the last line of the Preamble and the positive obligations of the RS which follow from Articles II.3 (m) and II.5 of the Constitution of BiH.

75. Accordingly, it would not be necessary for the Constitutional Court to pursue the applicant's assertion that Article 1 of the Constitution of RS was also discriminatory by providing a constitutional basis for the violation of individual rights in a discriminatory manner as prohibited by Article II.4 of the Constitution of BiH. However, insofar as the request of the applicant is not only concerned with the collective equality of the constituent peoples but also with discrimination against individuals, particularly against refugees and displaced persons regardless of their ethnic origin, the Court shall also review Article 1 of the Constitution of RS in light of this assertion made by the applicant.

76. Hence, the Court shall first elaborate the standard of review in more detail.

77. The language of Article II.4 of the Constitution of BiH evidently follows the text of Article 14 of the ECHR with an adaptation insofar as the list of rights and freedoms whose enjoyment shall be secured is concerned: "The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

78. As it ensued from this text, the list includes both the rights and freedoms provided for in Article II and those in the international agreements listed in Annex I to the Constitution. Hence, these are the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto, as follows from the reference made in paragraph 3, including the rights enumerated therein. Furthermore, paragraph 5 of Article II includes particular individual rights for all refugees and displaced persons to freely return to their homes of origin and to have restored to them property of which they had been deprived in the course of hostilities since 1991. These individual rights provided for in paragraph 5 are, however, not different or additional rights but a specific affirmation of the right to property, the right to liberty of movement and residence, and the right not to be subjected to inhuman or degrading treatment already enumerated in paragraph 2 of Article II of the Constitution of BiH.

79. Moreover, as follows from the reference in Article II.5 to Annex 7 of the General Framework Agreement, further elaboration of the criteria under this Annex of the non-discrimination rule must be justified. In particular, its Article I.3 (a) provides that the Parties, i.e. also the Entities, must repeal all "legislation and administrative practices with discriminatory intent or effect". How is it therefore possible to show discriminatory "intent or effect"? Of course, there are several ways, of which the following must certainly be pursued:

a) The law discriminates *prima facie*, i.e. in its explicit terms, by using criteria such as language, religion, political or other opinion, national origin, association with a national minority or any other status for the classification of categories of people which will then be treated differently on that basis. However, it would lead to obviously absurd results if every difference on those grounds were prohibited. There are situations and problems that, on account of differences inherent therein, call for different legal solutions; moreover, certain legal inequalities are sometimes needed to correct factual inequalities. Hence, the European Court of Human Rights elaborated a standard of interpretation, according to which the principle of equality of treatment is violated if the distinction has no reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration. Accordingly, a difference of treatment in the exercise of a right must not only pursue a legitimate aim regarding the principles which normally prevail in democratic societies. The non-discrimination provision is likewise violated when it is clearly found that there is no reasonable relationship of proportionality between the means used and the aim sought to be accomplished. The principle of proportionality thus presupposes four steps of consideration: whether there is a justified public aim, whether the means employed can achieve a legitimate goal, whether the means are necessary, i.e. do they have the minimum of relevance to fulfil the goal, and finally, whether the burdens imposed are proportional in comparison to the significance of the goal.

b) the law, although *prima facie* neutral, is administered in a discriminatory way;

c) the law, although it is *prima facie* neutral and is applied in accordance with its terms, was enacted with the purpose of discrimination, as follows from the law's legislative history, statements made by legislators, the law's disparate impact, or other circumstantial evidence of intent;

d) the effects of past *de jure* discrimination are upheld by respective public authorities at all state levels, not only by their actions but also through their inaction.

80. The last rule apparently demonstrates that the non-discrimination provision is not confined to strictly "negative" individual rights not to be discriminated against by the public authorities, but also includes "positive" obligations to take action. That this obligation is a particular responsibility of the Entities may already be demonstrated by Article III.2 (c) of the Constitution, which provides that "the Entities shall provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards and with respect for internationally recognized human rights and fundamental freedoms referred to in Article II above, and by taking such other measures as deemed appropriate". In addition, with particular intent to provide for the establishment of suitable conditions for the return of refugees and displaced persons, Article II.1 of Annex 7 imposes an obligation on the parties to undertake "to create in their territories political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without giving preference to any particular group". The list of measures, enumerated in Article I.3 (a), then specifies this general positive obligation including, not only the repeal of domestic legislation and administrative practices with discriminatory intent or effect, as

already quoted above, but also "the protection of ethnic and/or minority populations" against acts of retribution by public officials as well as private individuals.

81. In the final analysis, all public authorities in BiH must refrain from any acts of discrimination in the enjoyment of individual rights and freedoms referred to (particularly on grounds of national origin). In addition, they have a positive obligation to protect against the discriminatory acts of private individuals and, with respect to refugees and displaced persons, to create necessary political, social and economic conditions for their harmonious reintegration.

In light of these standards, the Constitutional Court finds:

82. It is true that the Constitution of RS contains a number of specific provisions which provide for the prohibition against discrimination in the enjoyment of these individual rights in the Constitution of RS are quoted by the representatives of the RS People's Assembly. Although this prohibition should be considered a necessary requirement, the proclamation of non-discrimination is, in light of the criteria of review elaborated above, by no means sufficient. Moreover, these non-discrimination provisions in relation to the list of rights of the Constitution of RS cannot *per se* guarantee the effective enjoyment of the rights enumerated in the Constitution of BiH, the ECHR, or the international instruments listed in Annex 1 to the Constitution of BiH.

83. Regarding the first standard of review – that Article 1 must not discriminate *prima facie* by using national origin for a classification of different categories of persons which will then be treated differently without reasonable justification – the Court cannot follow the allegations of the applicant's representatives that the wording of Article 1 would lead to an "automatic exclusion" of persons of non-Serb origin. It is the very nature of the compromise between both the ethnic and non-ethnic principle for the legitimacy of the exercise of "state" powers that the formula of Article 1 does not create two distinct, mutually exclusive categories of persons. An interpretation contrary to this one would lead to the obviously absurd result that the members of the Serb people would *ex constitutione* not be the citizens of the Republika Srpska.

84. Nevertheless, the first element of the provision – "Republika Srpska shall be the state of the Serb people" – must trigger a strict scrutiny with regard to the other standards of review. Hence, does this provision provide the constitutional basis for discriminatory legislation, discriminatory administrative or judicial practice of the authorities? Is there other circumstantial evidence, such as the comparison of population figures or the numbers of returnees, which shows such a disparate impact as to indicate that the effects of past *de jure* discrimination (ethnic cleansing in particular) are upheld by the authorities or that they violate their obligation to provide for protection against the violence of private individuals and to create respective "political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without giving preference for any particular group"?

85. Regarding the factual situation in the Republika Srpska, the Constitutional Court finds the following facts to be ascertained in accordance with Article 22 of its Rules of Procedure:

86. As far as the population figures are concerned, the number of Bosniacs, Croats, Serbs and "Others" living on the territory of the RS is as follows:

Ethnic Breakdown of the Population on the Republika Srpska territory according to the 1991 Census in comparison with the year 1997 (Source: IMG, on the basis of the 1991 census and the UNHCR estimates for 1997)

	1991	1997
Serbs	54.30 %	96.79 %
Bosniacs	28.77 %	2.19 %
Croats	9.39 %	1.02 %
Others	7.53 %	0.00 %

87. As the figures show, the ethnic composition of the population living on the territory of the RS has drastically changed since 1991. In terms of statistics, although the Serb population enjoyed a slight absolute majority in 1991 as far as the statistics for a hypothetical territory of the Republika Srpska is concerned, they did not live territorially concentrated. The territory where the Republika Srpska was established later, under the GFAP, did form an area with a »mixed population« as was the case all over the territory of the former Republic of Bosnia and Herzegovina. Due to massive ethnic cleansing during the war prior to the conclusion of the Dayton Agreement, the population figures of 1997 show that the Republika Srpska is now an almost ethnically homogeneous entity. As the figures for the regions in the eastern part of the Republika Srpska show, the attribute "almost" may be omitted. With the exception of Srpski Brod and Trebinje, all municipalities had a record of 99% or more of a Serb population in 1997.

88. The conclusion reached from these figures is supported by a comparison of the figures for the overall return of refugees and displaced persons to the Republika Srpska along with those of the so-called "minority" return. By 31 January 1999 (UNHCR, Statistics Package of 1 March 1999), a total of 97,966 refugees and displaced persons returned to the Republika Srpska. The ethnic breakdown of this figure again reveals that only 751 Croats and 9,212 Bosniacs returned, as opposed to 88,003 Serbs. Hence, the so-called "minority" return amounted to 10.17% of an already small percentage of those who had returned at all.

89. Contrary to the allegations of the representatives of the People's Assembly of the Republika Srpska that problems with the return of refugees and displaced persons could not be reduced to discriminatory patterns vis-à-vis citizens of non-Serb origin but were much more complex (including social and economic conditions), this comparison obviously demonstrates that such a tremendous discrepancy according to the ethnic origin of refugees and displaced persons cannot be explained by generally severe economic and social conditions which are the same for all persons willing to return to the Republika Srpska. Such a discrepancy can thus only be explained by the ethnic origin of refugees and displaced persons and constitutes manifest proof of differential treatment vis-à-vis refugees and displaced persons *solely* on the grounds of ethnic origin.

90. These figures thus provide sufficient evidence of a "discriminatory effect" in the sense of Article I.3 (a) of Annex 7 so that the results of past *de jure* discrimination through ethnic cleansing have been upheld in the Republika Srpska.

91. Moreover, there is also clear evidence that the discriminatory pattern demonstrated by this circumstantial evidence may be reasonably linked with the institutional structures of the authorities of the Republika Srpska and their discriminatory practices.

92. First of all, despite the fact that approximately 25% of the members of the People's Assembly of the Republika Srpska are non-Serbs, the ethnic composition of the RS Government is ethnically homogeneous: all 21 Ministers, including the Prime Minister, are of Serb origin (Source: Ministry for Civilian Affairs and Communications of BiH). The same applies to the ethnic composition of the RS police forces and the judiciary represented by judges and public prosecutors, as illustrated by the following chart (Source: IPTF with figures as of 17 January 1999 made available to the Court).

	Serbs	Bosniacs	Croats
Judges and Public Prosecutors	97.6%	1.6%	0.8%
Police forces	93.7%	5.3%	1.0%

93. As far as the number of judges and prosecutors is concerned, all nine persons comprising the number of Bosniacs and Croats out of a total of 375 were located in Brcko and appointed only under the supervisory regime of the international community. Furthermore, as can be seen from para. 84 of the Brcko Arbitration Award of 1997, the Tribunal concluded from the RS "Basic General Principles" that the "fairly obvious purpose – and the result – (...) to keep Brcko an ´ethnically pure´ Serb community is in plain violation of the Dayton peace plan".

94. Finally, after many reports of OHR, the ICG, the Human Rights Ombudsperson for BiH etc. on numerous incidents in the Republika Srpska, the Human Rights Ombudsperson for BiH stated in her Special Report (No. 3275/99) titled "On Discrimination in the Effective Protection of Human Rights of Returnees in Both Entities of Bosnia and Herzegovina" of 29 September 1999 that "return-related incidents and a passive attitude of the police and other competent authorities were predicated solely on the basis of national origin of those affected". She therefore finally concluded that "returnees have been discriminated against on grounds of their national origin in the enjoyment of their rights guaranteed by Articles 3 and 8 of the Convention, by Article 1 of Protocol No. 1 thereto and the right to equality before the law and equal protection before the law as provided in Article 26 of the ICCPR" (International Covenant on Civil and Political Rights).

95. *In conclusio*, the Court finds that, following the entering into force of the Dayton Agreement, there was and still is a systematic, long-lasting, purposeful discriminatory practice of the public authorities of the Republika Srpska in order to prevent so-called "minority" returns, either through direct participation in violent incidents or by abstaining from the obligation to protect people against harassment, intimidation, or violent attacks on grounds of ethnic origin only, let alone the failure "to establish necessary political, economic and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without giving preference to any particular group", which follows from the right of all refugees and displaced persons to freely return to their homes of origin according to Article II.5 of the Constitution of BiH. In addition, an almost ethnically homogeneous executive and judicial power of the Republika Srpska is a clear indicator that this part of the provision of Article 1 with the wording "The Republika Srpska is the state of the Serb people" must be taken verbatim and provides the necessary link with a purposeful discriminatory practice of the authorities with the effect of upholding the results of past ethnic cleansing. Finally, the remark of the expert of the People's Assembly at the public hearing that "the Republika Srpska can be called a state as her statehood is the expression of her original, united, historical people's movement, of her people that has a *united ethnic basis* and forms an independent system of power" (emphasis added) provides evidence of the discriminatory intent of Article 1 of the Constitution of RS, particularly if interpreted in connection with its Preamble.

96. However, ethnic segregation can never be a "legitimate aim" with respect to the principles of »democratic societies« as required by the European Convention on Human Rights and the Constitution of BiH. Nor can ethnic segregation or, the other way round, ethnic homogeneity based on territorial separation, serve as a means to "uphold peace on these territories" – as argued by the representative of the People's Assembly – in light of the explicit wording of the text of the Constitution that "democratic governmental institutions and fair procedures best produce peaceful relations within a pluralist society".

97. It therefore also follows from the "totality of these circumstances" that the wording of Article 1 of the Constitution of RS as quoted above violates the right to liberty of movement and residence, the right to property, and freedom of religion in a discriminatory manner on the grounds of national origin and religion as guaranteed by Article II paragraphs 3 and 4 taken in conjunction with paragraph 5 of the Constitution of BiH.

98. The Constitutional Court thus finds the wording "state of the Serb people and" in Article 1 of the Constitution of RS unconstitutional.

B. Regarding the Constitution of the Federation

a) The challenged provision of Article I.1 (1) in the wording of Amendment III to the Constitution of the Federation reads as follows:

Bosniacs and Croats as constituent peoples together with Others, and the citizens of Bosnia and Herzegovina from the territory of the Federation of Bosnia and Herzegovina, in exercising their sovereign rights, transform the internal structure of the territory of the Federation of Bosnia and Herzegovina, as defined by Annex II to the General Framework Agreement, so that the Federation of Bosnia and Herzegovina consists of federal entities with equal rights and responsibilities.

99. The applicant considers that the provision Article I.1 (1) of the Constitution of the Federation of Bosnia and Herzegovina, according to which Bosniacs and Croats are the constituent peoples of the Federation, is not in conformity with the last paragraph of the Preamble of the Constitution of BiH nor with Article II.4 and 6 insofar as, pursuant to these provisions, all three peoples (Bosniacs, Croats and Serbs) are constituent peoples on the entire territory of BiH. Therefore, the Constitution of the Federation could not designate only Bosniacs and Croats as constituent peoples. Moreover, the challenged provision would prevent the exercise of the fundamental right of all refugees and displaced persons to return to their homes of origin in order to restore the ethnic structure of the population that had been disturbed by war and ethnic cleansing.

100. The arguments of the parties with respect to the legislative history of both the Washington Agreement and the Dayton Agreement, the conclusions that could be arrived at from the institutional structures of the joint institutions of BiH and the functional interpretation of the Dayton Agreement, were already outlined above in connection with the challenged provision of Article 1 of the Constitution of RS (see paragraphs 35. to 46. supra). It remains to elaborate on the arguments with specific reference to the text of Article I.1 (1) of the Constitution of the Federation.

101. At the public hearing the applicant's representative also required the constituent status of all three peoples in the Federation of BiH and full equality of the languages and alphabets. He stressed, however, that the Constitution of the Federation contained some specific features, particularly regarding this issue. The Constitution of the Federation does, beside the constituent status of

Bosniacs and Croats, guarantee equality to the category of "Others" also with the consequence that they are proportionally represented in all institutions of the Federation. This guarantee would "partly amortize the problem".

102. The expert of the House of Representatives contended at the public hearing that the Preamble of the Constitution of the Federation spoke of peoples and citizens who are equal. In his opinion, this reference includes not only Bosniacs and Croats but also all three peoples. Furthermore, according to the original text as well as the later amended text of the Constitution of the Federation, the category of "Others" did gain constituent status. In substance, the category of "Others" would mean that Serbs, as it can be seen from the institutions of the Federation, are represented under the label "Others". Hence, the "*intentio constitutionalis"* would be fully met if others were not the category of "Others" but the third constituent people of BiH. However, although the representation of the category of "Others" practically speaking leads principally to the representation of Serbs, this representation would not be sufficient. Therefore, even the Constitution of the Federation has this imperfection.

The Constitutional Court finds:

103. As far as the interpretation of the last paragraph of the Preamble to the Constitution of BiH with respect to Bosniacs, Croats, and Serbs as constituent peoples, the legislative history, the institutional structures of the joint institutions of BiH, and the function of the Dayton Agreement are concerned, the Court refers to its findings in conjunction with Article 1 of the Constitution of RS (paragraphs 50 to 74 above).

104. As for the compromise formula of ethnicity and citizenship, the same finding holds true for the Constitution of the Federation. However, there is a distinct difference with respect to Article 1 of the Constitution of RS insofar as Article I.1 of the Constitution of the Federation provides for the category of "Others". However, this category is only a half-hearted substitute for the status of a constituent people and the privileges they enjoy in accordance with the Constitution of the Federation, as it will be demonstrated below.

105. Unlike the Constitution of the RS, the Constitution of the Federation does provide for the proportional representation of Bosniacs, Croats and "Others" in several governmental bodies. In some cases, however, it reserves a privilege to the Bosniac and Croat representatives to block the decision-making process. These institutional mechanisms must trigger a strict scrutiny of review, not only with respect to collective equality as far as constituent peoples are concerned, but also as to whether the individual right to vote according to Article 3 of the First Additional Protocol to the ECHR is guaranteed without discrimination on grounds of national origin. Moreover, the provision of Article 5 in the Convention on the Elimination of all Forms of Racial Discrimination must be applied in BiH in accordance with Annex I to the Constitution of BiH and therefore, imposes not only an obligation on the State of BiH, but guarantees individual rights according to paragraph (c) of that provision, namely "political rights, in particular the rights to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service". From the definition provided in Article 1 of the Convention, it is clear that "the term `racial discrimination´ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". Paragraph 4 of Article 1 provides that "special measures taken for the sole purpose of securing

adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination (...)."

106. Hence, the basic legal problem raised in this regard is the question whether the "special rights" provided in the Constitution of the Federation for the two constituent peoples, the Bosniacs and Croats, violate the enjoyment of individual political rights to the extent that they seem to provide for "giving preference based on national or ethnic origin" as meant by Article 5 of the Convention.

107. The Constitution of the Federation contains the following "special rights" for members of the two constituent peoples so that their designation as "constituent" may be discriminatory in the sense of the Convention:

108. According to Article II.B.1, there shall be three Ombudsmen: one Bosniac, one Croat, and one representing "Others". With respect to parliamentary representation, there are no ethnic requirements for the House of Representatives, whereas the House of Peoples shall consist of 30 Bosniacs and 30 Croats as well as a proportional number of "Others". Article IV.A.8 establishes that these delegates shall be elected "by respective representatives in a legislative body", i.e. Bosniacs, Croats and Others among the Cantonal legislators. According to Article IV.A.18, only delegates of the two constituent peoples may claim that a decision of the House of Peoples concerns their "vital interest" with the effect of a "suspending veto" while the Constitutional Court of the Federation of BiH finally resolves disputes in the case of different majorities. Moreover, in accordance with Article VIII.1, a majority of Bosniac or Croat delegates in the House of Peoples may veto amendments to the Constitution. Article IV.B.3 prescribes that the Chair of a House of Legislature must come "from another constituent people", thereby reserving these offices to members of the constituent peoples.

109. With respect to the executive authorities, Article IV.B.2 of the Constitution of the Federation, provides for the election of the President and Vice-President with a caucus of Bosniac Delegates and a caucus of Croat Delegates to the House of Peoples each nominating one person. Article IV.B.5 reserves one-third of the ministerial positions for "Croats". Article IV.B.6 again confers the veto-power on the representatives of constituent peoples. Article IV.B.4, as revised by Amendment XII, prescribes that no Deputy Minister may be a member of the same constituent people as the Minister.

110. As far as the judiciary authority is concerned, Article IV.C.6 prescribes that there shall be an equal number of Bosniac and Croat judges on each court of the Federation whereas "Others" shall be proportionally represented. Accordingly, Article IV.C.18 establishes a Human Rights Court with three judges: one Bosniac, one Croat, and one from the category of Others.

111. As for the Federation structures, Article V.8 provides for a minimum representation of each constituent people in Cantonal Governments whereas Cantonal Judges shall, according to Article V.11, be nominated in such a way that the composition of the judiciary as a whole shall reflect that of the population of the Canton.

112. The provisions of the Constitution of the Federation which provide for a minimum or proportional representation and veto powers for certain groups certainly do constitute a "preference" in the sense of Article 5 of the Convention on Racial Discrimination. However, insofar as they create preferential treatment in particular for members of the two constituent peoples, they

cannot be legitimised under Article 1 paragraph 4 since these "special measures" are certainly not "taken for the sole purpose of securing adequate advancement" of Bosniacs or Croats "requiring such protection" in order to ensure equal enjoyment of rights.

113. As it can be seen from the legislative history of the Constitution of the Federation, these institutional safeguards were introduced with the aim of power-sharing which is a legitimate aim for the political stabilization and democratisation through "consensus government". However, to what extent may institutional devices for the representation and participation of groups with the aim of power sharing infringe individual rights and in particular, voting rights? Can there be a "compromise" between individual rights and collective goals such as power-sharing? In trying to answer this question, two extreme positions, which mark the ends of a scale for weighing contradicting rights and goals or interests, must serve as the starting points.

114. Do, for instance, language rights, i.e. legal guarantees for the members of minority groups to use their mother tongue in proceedings before courts or administrative bodies really constitute a "privilege" that members of the "majority" do not have insofar as they have to use the "official language", which is their mother tongue by the way? Such an obviously absurd assertion takes the unsaid norm of the ethnically conceived nation-State for granted by "identifying" the language of the "majority" with the state. As opposed to the ideological underpinnings of the ethnically conceived nation-State stands the alleged necessity of "exclusion" of all elements which disturb ethnic homogeneity – such "special rights" are thus necessary in order to maintain the possibility of a pluralist society against all trends of assimilation and/or segregation which are explicitly prohibited by the respective provisions of the Convention on the Prevention of All Forms of Racial Discrimination which must be applied directly in Bosnia and Herzegovina in accordance with Annex 1 to the Constitution of BiH.

115. However, if a system of government is established which reserves all public offices only to members of certain ethnic groups, the "right to participation in elections, to take part in government as well as in the conduct of public affairs at any level and to have equal access to public service" is seriously infringed for all those persons or citizens who do not belong to these ethnic groups insofar as they are denied the right to stand as candidates for such governmental or other public offices.

116. The question is thus raised as to the extent that the infringement of these political rights might be legitimised. Political rights, in particular voting rights including the right to stand as a candidate, are fundamental rights insofar as they reach the heart of a democratic, responsible government required by the provisions of the Preamble, paragraph 3, and Article I.2 of the Constitution of BiH and the respective provisions of the European Convention on Human Rights and other international instruments referred to in Annex I to the Constitution of BiH. A system of *total exclusion* of persons on grounds of national or ethnic origin from representation and participation *in executive and judicial bodies* gravely infringes such fundamental rights and can therefore never be upheld. Consequently, all provisions reserving a certain public office in the executive or judiciary authority exclusively for a Bosniac or Croat without the possibility for a member of "Others" to be elected *or* granting veto-power to one or the two of these peoples only is a serious breach of Article 5 of the Convention on Racial Discrimination and the constitutional principle of equality of the constituent peoples. These institutional mechanisms cannot be viewed as an "exemption" by virtue of Article 1, paragraph 4 of the Convention on Racial Discrimination as they favour two constituent peoples who form the "majority" of the population. Nor are these mechanisms necessary for these two peoples in order to achieve full or "effective" equality in the sense of Article 1, paragraph 4 of the Convention on Racial Discrimination.

117. Provisions granting a minimum or proportional representation in governmental bodies are thus not *per se* unconstitutional. The problem is to whom they give preferential treatment! Therefore, the very same mechanisms for "Others" in the Constitution of the Federation are certainly in conformity with Article 1 paragraph 4 of the Convention on Racial Discrimination under the present circumstances in the Federation of BiH.

118. Minimum or proportional representation *in the Federation legislature* must be interpreted from a different angle. To the extent that there is a bicameral parliamentary structure in the first Chamber based on universal and equal suffrage without any ethnic distinctions and that the second Chamber, the House of Peoples, also provides for the representation and participation of others, there is not *prima facie* a system of *total* exclusion from the right to stand as a candidate.

119. In the case *Mathieu-Mohin and Clairfayt vs. Belgium* (9/1985/95/143) the majority of the European Court of Human Rights ruled that Article 3 of the First Protocol to the ECHR was not violated as the French-speaking electors in the Halle-Vilvoorde district were "in no way deprived" of the right to vote and the right to stand for election on the same legal grounds as the Dutch-speaking electors "by the sheer fact that they must vote either for candidates who will take the parliamentary oath in French and will accordingly join the French-language group in the House of Representatives or the Senate and sit on the French Community Council, or else for candidates who will take the oath in Dutch and so belong to the Dutch-language group in the House of Representatives or the Senate and sit on the Flemish Council". In the words of a dissenting opinion, "the practical consequence would be that unless they vote for Dutch-speaking candidates, the French-speaking voters in this district will not be represented in the Flemish Council". Article 3 of the First Protocol, unlike the 1964 American Voting Rights Act, thus does not guarantee a right to vote for "a candidate of one's choice".

120. It could thus be argued that there is no violation of Article 3 of the First Protocol if a Croat voter has to cast his/her vote for a Bosniac or Serb candidate etc. However, there is at least one striking difference in the electoral mechanisms of Belgium on one hand and the Federation of BiH on the other, particularly as far as the right to stand as a candidate is concerned. The Belgian system does not exclude *per se* the right to stand as a candidate *solely* on grounds of language. Every citizen can stand as a candidate, but must – upon his/her choice – decide whether he/she will take the oath in French or in Flemish. It is therefore the subjective choice of each individual candidate whether to take the oath in French or in Flemish and thereby to "represent" a specific language group, whereas provisions of the Constitution of the Federation of BiH provide for *a priori* ethnically defined Bosniac and Croat delegates, caucuses and veto powers for them.

121. Moreover, the European Court found that – although states have "a wide margin of appreciation in this area" – it rested with the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with: "It must satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate" so as to "thwart the free expression of the opinion of the people in the choice of legislature".

122. The Constitutional Court must consequently assess the constitutional provisions of the Constitution of the Federation of BiH in light of the factual and legal differences with the leading case of the ECHR and its interpretation of the First Protocol that provides that states have no (!) margin of appreciation insofar as the "essence" and "effectiveness" of the free expression of the opinion of the people in the choice of their legislature are concerned.

123. As already outlined supra, there are no ethnic presuppositions for the House of Representatives, whereas the House of Peoples shall consist of 30 Bosniacs and 30 Croats as well as a proportional number of "Others". Article IV.A.8 provides that those delegates must be elected "by respective representatives", i.e. Bosniacs, Croats and "Others" in the Cantonal legislative bodies. According to Article IV.A.18, only delegates of the two constituent peoples may claim that a decision of the House of Peoples concerns their "vital interest" with the effect of a "suspending veto" as the Constitutional Court of the Federation of BiH must finally resolve disputes in case of different majorities. Article IV.B.3 establishes that the Chair of a House of the Legislature must be "from another constituent people" thereby reserving these offices to members of the constituent peoples.

124. In light of the criteria established supra, the Court finds that the institutional structure of representation through the bicameral system, as such, does not violate the respective provisions of the First Protocol. What raises serious concerns, however, is the combination of exclusionary mechanisms in the system of representation and decision-making through veto-powers on behalf of ethnically defined "majorities" which are, nonetheless, in fact minorities and are thus able to force their will on the parliament as such. Such a combined system of ethnic representation and veto-power for one ethnic group – which is defined as a constituent people, but constitutes a parliamentary minority –not only infringes upon the collective equality of constituent peoples, but also the individual's right to vote and to stand as a candidate for all other citizens to such an extent that the very essence and effectiveness of "the free expression of the opinion of the people in the choice of legislature" is substantially impaired. In the final analysis, the designation of Bosniacs and Croats as constituent peoples in accordance with Article I.1 (1) of the Constitution of the Federation serves as the constitutional basis for constitutionally illegitimate privileges given only to these two peoples within the Federation's institutional structures.

125. There is an argument that, since the text of the Preamble of the Constitution of BiH (insofar as it refers to constituent peoples) was modelled upon Article I of the Constitution of the Federation, the latter provision cannot violate the former. However, this argument does not account for the fact that the Preamble of the Constitution of BiH designates all three peoples as constituent, whereas Article I of the Constitution of the Federation designates only two of them as constituent with the discriminatory effect outlined above.

126. Thus, although even the Preamble of the Constitution of the Federation explicitly prescribes the equality of all peoples, i.e. including the constituent peoples, their full equality as required under the Constitution of BiH is not guaranteed because they are not given the same effective participation in the decision-making processes taking place in the Federation Parliament.

127. *In conclusio*, Bosniacs and Croats, on the basis of the challenged Article I.1 (1), enjoy a privileged position which cannot be legitimised since they are neither on the level of the Federation nor on the level of Bosnia and Herzegovina in the factual position of an endangered minority which must preserve its existence.

128. Accordingly, it would not be necessary for the Constitutional Court to pursue the applicant's allegation that Article I.1 (1) of the Constitution of the Federation is discriminatory by providing the constitutional basis for the violation of individual rights, other than the right to vote and standing as a candidate, in a discriminatory manner as prohibited by Article II.4 of the Constitution of BiH. However, as the request of the applicant is not only concerned with the collective equality of the constituent peoples but also with discrimination against individuals, in

particular against refugees and displaced persons regardless of their ethnic origin, the Court will also review Article I.1 (1) of the Constitution of the Federation in light of this allegation made by the applicant.

129. The constitutional issue raised by the applicant in this respect is the question whether the challenged provision does have a discriminatory intent or effect with respect to the enjoyment of individual rights guaranteed under the Constitution of BiH. As this issue was the case with Article 1 of the Constitution of RS, the wording of this provision does not create mutually exclusive categories of persons so that it is not *prima facie* discriminatory. Nevertheless, the explicit designation of Bosniacs and Croats triggers a strict scrutiny with respect to the other standards of review elaborated in detail above (see paragraphs 79 to 81). Hence, does this provision provide the constitutional basis for discriminatory legislation, discriminatory administrative or judicial practice of the authorities? Is there other circumstantial evidence – such as the comparison of population figures or the numbers of returns – which shows such a disparate impact as to indicate that the effects of past *de jure* discrimination, in particular of ethnic cleansing, are upheld by the authorities or that they violate their obligation to provide for protection also against the violence of private individuals and to create respective "political, economic, and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without giving preference to any particular group"?

130. Regarding the factual situation in the Federation of BiH, the Constitutional Court found the following facts according to Article 22 of its Rules of Procedure:

As far as population figures are concerned, the number of Bosniacs, Croats, Serbs and "Others" living on the territory of the Federation is as follows:

Ethnic Breakdown of the Population on the Federation territory according to the 1991 Census in comparison with 1997 (Source: IMG, on the basis of the 1991 census and UNHCR estimates for 1997)

	1991	1997
Bosniacs	52.09%	72.61%
Croats	22.13%	22.27%
Serbs	17.62%	2.32%
Others	8.16%	2.38%

131. As demonstrated by these figures, the proportional number of Croats living on the territory of the Federation remained almost the same. The proportional number of Bosniacs increased to more than a two-thirds majority, whereas that of Serbs dramatically decreased. Although the territory of the Federation obviously formed an area with "mixed population" of three constituent peoples and others in 1991, the population figures from 1997 clearly show that the Federation is now an "entity" of the members of only two of three constituent peoples.

132. The conclusions reached from these figures are supported again by a comparison of the figures for the overall return of refugees and displaced persons to the Federation with those of the so-called "minority" returns.

133. In order to encourage the local authorities to make minority returns possible, representatives of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, the Sarajevo Canton and the international community adopted the Sarajevo Declaration on 3 February 1998. The goal of the Declaration was to allow for at least 20,000 minority returns in 1998, which is, by the way, in itself sufficient evidence of discriminatory intent. Nevertheless, the actual number of returns decreased and the overall results stayed far below the expected figures of 20,000 "minority" returns for 1998.

134. By 31 January 1999, only 19,247 Serb refugees and displaced persons had returned to the Federation of BiH in comparison to 380,165 Bosniacs and 74,849 Croats (Source: UNHCR, Statistics Package of 1 March 1999). The so-called "minority" return of Serbs amounted to 4.05% of all those who returned.

135. Again, this comparison obviously demonstrates that such a tremendous discrepancy according to the ethnic origin of refugees and displaced persons cannot be explained by the overall economic and social conditions but provides undisputable evidence of differential treatment vis-à-vis refugees and displaced persons solely on the grounds of ethnic origin.

136. Although the provisions of the Constitution of the Federation provide for a proportional representation of "Others" in the governmental bodies of the Federation and the representatives of the applicant had acknowledged in the course of the public hearing that the constitutional category of "Others" provides for access of people of Serb origin to governmental bodies, Serbs and "Others" in the sense of census figures are still underrepresented in police forces not only with regard to the 1997 population figures but much more in comparison with 1991. Accordingly, the small number of Serbs in the Federation police forces could raise doubts as to their "impartiality" with respect to ethnic origin.

Ethnic Breakdown of the Federation police forces and the judiciary composed of judges and public prosecutors (Source: IPTF with figures of 17 January 1999 made available to the Court).

	Bosniacs	Croats	Serbs	Others
Judges and Public Prosecutors	71.72%	23.26%	5.00%	no figures
Police forces	68.81%	29.89%	1.22%	0.08%

137. That these doubts are not ill founded from the outset, may again be demonstrated by numerous reports of OHR, the ICG, the Ombudsperson for BiH etc. on numerous incidents in the Federation and the discriminatory practices of the Federation authorities which help to explain the small number of the so-called "minority" returns. The Human Rights Ombudsperson for BiH stated in her Special Report (No. 3275/99) "On Discrimination in the Effective Protection of Human Rights of Returnees in Both Entities of Bosnia and Herzegovina" of 29 September 1999: "return-related incidents at issue and the passive attitude of the police and other competent authorities were predicated solely on the basis of national origin of those affected". She finally concluded that "returnees have been discriminated against on grounds of their national origin in the enjoyment of their rights guaranteed under Article 3 and 8 of the Convention, under Article 1 of Protocol No. 1 thereto and equality before the law and equal protection before the law as provided in Article 26 of the ICCPR".

138. *In conclusio*, the Court holds that following the Dayton-Agreement entering into force there was and still is a systematic, long-lasting, purposeful discriminatory practice of the public authorities of the Federation of BiH in order to prevent the so-called "minority" returns either through direct participation in violent incidents or by not fulfilling their obligation to protect people against harassment, intimidation or violent attacks solely on grounds of their ethnic origin, let alone the failure "to create the necessary political, economic and social conditions conducive to the voluntary return and harmonious reintegration" which follows from the right of all refugees and displaced persons freely to return to their homes of origin according to Article II.5 of the Constitution of BiH.

139. It follows from the "overall circumstances" that the designation of Bosniacs and Croats as constituent peoples in Article I.1 (1) of the Constitution of the Federation has a discriminatory effect and also violates the right to liberty of movement and residence and the right to property as guaranteed by Article II paragraphs 3 and 4 taken in conjunction with paragraph 5 of the Constitution of BiH. Moreover, the aforementioned provision of the Constitution of the Federation violates Article 5 (c) of the Convention on the Elimination of All Forms of Racial Discrimination and the right to collective equality following from the text of the Constitution of BiH as outlined above.

140. The Constitutional Court thus declares the wording "Bosniacs and Croats as constituent peoples, along with Others and" as well as "in the exercise of their sovereign rights" of Article I.1 (1) of the Constitution of the Federation unconstitutional.

141. The Constitutional Court adopted its Decision concerning paragraphs 1, 2, 3 and 5 of the Preamble of the Constitution of RS, as modified by Amendments XXVI and LIV, Article 1 of the Constitution of RS, as modified by Amendment XLIV, and Article I.1 (1) of the Constitution of the Federation of BiH, as modified by Amendment III, by 5 votes *pro* to 4 votes *con*.

142. The Decisions regarding the publication in the Official Gazettes of Bosnia and Herzegovina, the Republika Srpska and the Federation of Bosnia and Herzegovina and regarding the day when the provisions that are declared unconstitutional cease to be in effect are based on Articles 59 and 71 of the Court's Rules of Procedure.

The Court ruled in the following composition: Prof. Dr. Kasim Begić, President of the Constitutional Court, and Judges: Dr. Hans Danelius, Prof. Dr. Louis Favoreu, Prof. Dr. Joseph Marko, Dr. Zvonko Miljko, Azra Omeragić, Prof. Dr. Vitomir Popović, Prof. Dr. Snežana Savić and Mirko Zovko.

Pursuant to Article 36 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, Judge Hans Danelius expressed a concurring opinion, while Judges Zvonko Miljko, Vitomir Popović, Snežana Savić and Mirko Zovko expressed their dissenting opinions and they are annexed to this Partial Decision.

U 5/98 III
1 July 2000
Sarajevo

Prof. Dr. Kasim Begić
President
of the Constitutional Court of Bosnia and Herzegovina

CONSTITUTION OF THE REPUBLIKA SRPSKA

Paragraphs 1, 2, 3 and 5 of the Preamble

The introduction of sovereignty, state independence, establishment of a state and versatile and close connection of the Republika Srpska with other states of the Serb people in paragraphs 1, 2, 3 and 5 of the Preamble of the Constitution of RS represents the violation of Article I.1 taken in conjunction with Articles I.3, III.2 (a) and 5 of the Constitution of BiH, which guarantee sovereignty, territorial integrity, political independence and international sovereignty of BiH.

Article 1, as supplemented by Amendment 44

Preamble of the Constitution of BiH clearly designates Bosniacs, Croats and Serbs as constituent peoples, i.e. peoples.

Elements of a democratic state and society as well as underlying assumptions – pluralism, just procedures, peaceful relations that arise out of the Constitution – must serve as a guideline for further elaboration of the issue of the structure of BiH as a multi-national state.

Territorial division (of Entities) must not serve as an instrument of ethnic segregation – on the contrary – it must accommodate ethnic groups by preserving linguistic pluralism and peace in order to contribute to the integration of the state and society as such.

Constitutional principle of collective equality of constituent peoples, arising out of designation of Bosniacs, Croats and Serbs as constituent peoples, prohibits any special privileges for one or two constituent peoples, any domination in governmental structures and any ethnic homogenisation by segregation based on territorial separation.

Despite the territorial division of BiH by establishment of two Entities, this territorial division cannot serve as a constitutional legitimacy for ethnic domination, national homogenisation or the right to maintain results of ethnic cleansing.

Designation of Bosniacs, Croats and Serbs as constituent peoples in the Preamble of the Constitution of BiH must be understood as an all-inclusive principle of the Constitution of BiH to which the Entities must fully adhere, pursuant to Article III.3 (b) of the Constitution of BiH.

The Constitutional Court concludes that the provision of Article 1 of the Constitution of RS violates the constituent status of Bosniacs and Croats assigned by the last line of the Preamble of the Constitution of BiH, which, in addition to individual human rights and freedoms, contains positive obligations of the Entities to vouch for enjoyment of those rights and freedoms.

CONSTITUTION OF THE FEDERATION OF BOSNIA AND HERZEGOVINA

Article I.1 (1)

Designation of Bosniacs and Croats as constituent peoples in Article 1.1 (1) of the Constitution

of BiH has discriminatory consequences and violates the right to freedom of movement and residence and the right to property, guaranteed by Article II paragraphs 3 and 4 taken in conjunction with paragraph 5 of the Constitution of BiH. This provision also violates Article 5 (c) of the Convention on the Elimination of All Forms of Racial Discrimination and the right to collective equality, which arise out of the Constitution of BiH.

Moreover, in addition to clear constitutional obligation not to violate individual rights in a discriminatory manner, arising out of Article II.3 and 4 of the Constitution of BiH, there is also a constitutional obligation of non-discrimination in the sense of rights of groups if, for instance, one or two constituent peoples enjoy preferential treatment through Entity legal systems.

Furthermore, all public authorities in BiH, in addition to having to refrain from any discrimination in the enjoyment of individual rights and freedoms, primarily those based on national origin, also have a positive obligation to protect individuals from being discriminated against. In terms of refugees and displaced persons, they are additionally obligated to create necessary political, social and economic conditions for their smooth reintegration.

ANNEX
Concurring Opinion of Judge Dr. Hans Danelius
On the Partial Decision of the Constitutional Court of Bosnia and Herzegovina, No. 5/98 of 1 July 2000

I share the majority view that the challenged paragraphs of the Preamble of the Constitution of RS as well as Article 1 of the Constitution of RS and Article I.1(1) of the Federation Constitution are not in conformity with the Constitution of BiH. However, my reasons for reaching this conclusion differ to some extent from those expressed in the majority opinion. My opinion is based on the following considerations:

I Regarding the Preamble of the Constitution of RS

The challenged provisions of the Preamble read as follows:

Starting from the natural, inalienable and untransferable right of the Serb people to self-determination on the basis of which that people, as any other free and sovereign people, independently decides on its political and State status and secures its economic, social and cultural development;

Respecting the centuries-long struggle of the Serb people for freedom and State independence;

Expressing the determination of the Serb people to create its democratic State based on social justice, the rule of law, respect for human dignity, freedom and equality;

- - - - -

Taking the natural and democratic right, will and determination of the Serb people from Republika Srpska into account to link its State completely and tightly with other States of the Serb people;

Taking into account the readiness of the Serb people to pledge for peace and friendly relations between peoples and States;

I fully accept that the Preamble of the Constitution of RS should be regarded as part of that Constitution. The Constitutional Court is therefore entitled to examine whether this Preamble is in conformity with the Constitution of BiH.

The applicant argues that the quoted provisions of the Preamble of the Constitution of RS violate the last paragraph of the Preamble of the Constitution of BiH as well as Articles II.4, II.6 and III.3 (b) of the Constitution of BiH. He also refers to Article I.3 of the Constitution of BiH and argues that it is not justified to refer to Republika Srpska as a state.

The Constitution of BiH makes it clear that only Bosnia and Herzegovina is a state under international law. This point appears from Article I.1 of the Constitution of BiH according to which the Republic of Bosnia and Herzegovina, under the official name of Bosnia and Herzegovina, shall

continue its legal existence under international law as a state with its already internationally recognised borders.

It is true that the term ”state” is sometimes used not only for states which are independent subjects of international law, but also for other entities which enjoy a limited autonomy, in particular within the structure of a federal system (cf., for example, the states constituting the United States of America). In such cases, however, the specific form of statehood of the entities is recognised by the constitutional rules of the country, and it is almost invariably the federal constitution itself which confers such statehood on the entities and defines their constitutional status.

In the present case, however, Article I.3 of the Constitution of BiH provides that Bosnia and Herzegovina shall consist of two ”entities”, namely the BiH Federation and Republika Srpska, neither of which is called a state. The BiH Federation and Republika Srpska are also referred to as ”entities” in several other articles of the Constitution of BiH, and the term ”state” is nowhere used in that Constitution in respect of these entities.

Moreover, in a complex state such as Bosnia and Herzegovina, which is characterised by intricate relations between state and entities, it is important that a consistent terminology be used in the various constitutions. In its first partial decision in the present case, the Constitutional Court found that the use of the term “border (granica)” in Article 2.2 of the Constitution of RS to describe the boundaries between the entities was not in conformity with the Constitution of BiH, since the General Framework Agreement, of which the Constitution of BiH forms a part, makes a clear terminological distinction between a “border”, which is a frontier between states, and a “boundary”, which describes the internal geographical line separating Republika Srpska and the Federation.

For similar reasons, a consistent terminology should be used to describe the entities, and there is clearly no basis in the Constitution of BiH for calling Republika Srpska a state. In so far as the term “state” is used in the preambular provisions of the Constitution of RS in respect of Republika Srpska, they are therefore not in conformity with the Constitution of BiH.

The challenged provisions of the Preamble of the Constitution of RS also contain some other terms and expressions which cannot be considered consistent with the status of Republika Srpska as an entity within the state of Bosnia and Herzegovina. Insofar as the Preamble refers to the right of the Serb people to decide independently on its political and state status, to create its democratic state and to link that state completely and tightly with other states, the provisions are not compatible with the status of Republika Srpska as an entity. Nor can the reference in the Preamble to the struggle of the Serb people for state independence be considered to be in conformity with the legal status of Republika Srpska.

In these respects too, the challenged preambular provisions must therefore be considered to violate the Constitution of BiH.

II Regarding Article 1 of the Constitution of RS

Article 1 of the Constitution of RS provides:

Republika Srpska shall be the State of the Serb people and of all its citizens.

There are two aspects of this Article which raise questions with respect to its conformity with the Constitution of BiH, namely, on the one hand, the fact that Republika Srpska is referred to as a

"state" and, on the other hand, the fact that the Serb people – unlike the Bosniac and Croat peoples – is expressly mentioned as a people of Republika Srpska.

a) Regarding the first aspect, I have already explained, when commenting on the Preamble (see above under I), why I consider it not to be justified in the Constitution of RS to refer to Republika Srpska as a state. The same reasoning applies, *mutatis mutandis*, to Article 1 of the Constitution of RS, and on this point Article 1 of the Constitution of RS is therefore not in conformity with the Constitution of BiH.

b) Regarding the second aspect, the applicant first claims that there is an inconsistency with the last paragraph of the Preamble of the Constitution of BiH. That paragraph is an introduction to the actual text of the Constitution and reads:

Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows:

The Preamble of the Constitution of BiH must, in itself, be regarded as part of that Constitution. Accordingly, the Constitutional Court is in principle competent to examine whether the constitutions of the entities are in conformity with that Preamble. However, a precondition for finding a lack of conformity with the Preamble of the Constitution of BiH must be that the relevant provision of the Preamble is of a normative character and sets limits or imposes obligations which are binding on the entities.

The question is now whether Article 1 of the Constitution of RS, insofar as it refers to the Serb people but not to the Bosniac and Croat peoples, is in conformity with the above-mentioned provision of the Preamble of the Constitution of BiH. In this regard, I find it appropriate to take into account the contents and special character of that provision of the Preamble. As it appears from its wording, the provision does not contain any legal norm from which specific rights or obligations can be derived. The provision is no more than an introductory paragraph which identifies those who adopted and enacted the Constitution of BiH. It is in this context that Bosniacs, Croats and Serbs are referred to as constituent peoples together with others and as having, jointly with citizens of Bosnia and Herzegovina, determined the contents of the Constitution.

Thus, insofar as the said provision of the Preamble refers to the three peoples as constituent peoples, it does so in the context of the adoption and enactment of the Constitution of BiH only, and this provision cannot be considered to lay down any rule of a normative character or to create any concrete constitutional obligations.

It follows that there is no sufficient basis for finding Article 1 of the Constitution of RS to violate the last paragraph of the Preamble of the Constitution of BiH.

However, the applicant has also referred to Article II.4 and Article II.6 of the Constitution of BiH and alleged that Article 1 of the Constitution of RS is in conflict with those provisions.

Article II.4 and Article II.6 of the Constitution of BiH read as follows:

4. Non-Discrimination

The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to the Constitution shall be secured to all persons in Bosnia and

Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

6. Implementation

Bosnia and Herzegovina, and all courts, agencies, governmental organs, and instrumentalities operated by or within the Entities, shall apply and conform to the human rights and fundamental freedoms referred to in paragraph 2 above.

The question is therefore whether the reference to the Serb people in Article 1 of the Constitution of RS and the fact that the Bosniac and Croat peoples are not mentioned jointly with the Serb people constitutes discrimination contrary to the prohibition against discrimination in the Constitution of BiH.

A key element in the Constitution of BiH is the protection of human rights, and in this connection the prohibition against discrimination is given particular weight. According to Article II.2 of the Constitution, the European Convention on Human Rights, which in its Article 14 prohibits discrimination in respect of the rights protected in the Convention, shall apply directly in Bosnia and Herzegovina and have priority over all other law. Moreover, Article II.4 of the Constitution contains a specific prohibition against discrimination in the enjoyment of the rights provided for in Article II or in the international instruments which are protected under the Constitution.

In view of the circumstances in which the Constitution of BiH was adopted, it is easy to understand why particular attention was given to the discrimination issue. Discrimination and intolerance were causes of tragic events which had occurred in the years before the Constitution was adopted. Moreover, there can be no doubt that discrimination remained a serious problem in both entities of Bosnia and Herzegovina even after the Constitution had entered into force. Against this background it must be justified to interpret the said provisions of the Constitution in a strict manner. Consequently, special attention must be given to any constitutional or other legal provisions which could reasonably be understood as encouragement or approval of discriminatory practices or attitudes.

In connection with the war in Bosnia and Herzegovina, large numbers of people were forced to leave their homes and had to live elsewhere as refugees or displaced persons. The whole population structure in Bosnia and Herzegovina was dramatically changed. An important aim of the Dayton Peace Agreement and of subsequent efforts to secure lasting peace and stability is the return of these refugees and displaced persons to their homes. This aim is clearly reflected in Article II.5 of the Constitution of BiH. Any discrimination on ethnic grounds could make it more difficult to achieve this aim.

Article 1 of the Constitution of RS is drafted in an unusual manner in so far as it places side by side the Serb people, on the one hand, and all citizens of Republika Srpska, on the other. In fact, these two groups of people overlap, since most Serbs in Republika Srpska are at the same time citizens of Republika Srpska. It is true that the reference to all citizens includes those Bosniacs and Croats who are citizens of Republika Srpska. However, unlike the Serbs, the Bosniacs and Croats are not referred to as peoples but as citizens, which means that from a constitutional point of view they are not placed on an equal level with the Serbs.

It could be argued that the fact that, since the Serbs are at present the majority population in the territory of Republika Srpska and that they also were the majority - although a much smaller majority - before the war in Bosnia and Herzegovina broke out, it should be permissible to mention them as a special category in Article 1 of the Constitution of RS. However, in the prevailing circumstances a central provision in the Constitution of RS which makes Republika Srpska appear primarily as an entity of the Serb people is likely to be interpreted by those Bosniacs and Croats who live in Republika Srpska or who wish to return there as an indication that they are not accepted as being equal to the Serbs but are seen to a certain degree as second-class citizens.

Consequently, there is, in this respect, in Article 1 of the Constitution of RS a discriminatory element which cannot be disregarded. The Article may also contribute to dissuading refugees and displaced persons from returning and is therefore inconsistent with an important objective of the Constitution of BiH.

For these reasons I conclude that Article 1 of the Constitution of RS is not consistent with the prohibition against discrimination in the Constitution of BiH.

III Regarding Article I of the Federation Constitution

Article I.1(1) of the Federation Constitution provides:

Bosniacs and Croats as constituent peoples together with others, and the citizens from the territory of the Federation of Bosnia and Herzegovina, in exercising their sovereign rights, transform the internal structure of the territory of the Federation of Bosnia and Herzegovina, defined by Annex II of the General Framework Agreement, so that the Federation of Bosnia and Herzegovina consists of federal entities with equal rights and responsibilities.

The applicant considers that this provision is not in conformity with the last paragraph of the Preamble of the Constitution of BiH or with Article II.4 and Article II.6 of that Constitution in so far as it refers only to Bosniacs and Croats as constituent peoples.

For the same reasons as indicated in regard to Article 1 of the Constitution of RS (see under II above), I consider that the last paragraph of the Preamble of the Constitution of BiH does not contain a normative rule which could lead to a finding that Article I.1(1) of the Federation Constitution is not in conformity with that paragraph.

It remains to be examined whether Article I.1(1) of the Federation Constitution is discriminatory and therefore violates Article II of the Constitution of BiH.

I note that there are certain differences between Article I.1(1) of the Federation Constitution and Article 1 of the Constitution of RS.

First, according to its wording, Article I.1(1) of the Federation Constitution was meant to describe a constitutional change which was taking place in the territory which constituted the Federation ("Bosniacs and Croats … together with others, and the citizens of Bosnia and Herzegovina from the territory of the Federation of Bosnia and Herzegovina … transform the internal structure of the territory …"). The Article does not state that the Federation is and should remain an entity of Bosniacs and Croats but only that it was the Bosniacs and Croats who, together with others, transformed the structure of the territory of the Federation.

It is true that the Federation consists of territories with a majority of Bosniac and Croat population. However, for the same reasons as in regard to the Constitution of RS (see under II above), I do not consider this to be a sufficient justification for the reference in the Constitution to only Bosniacs and Croats.

Secondly, unlike Article 1 of the Constitution of RS, Article I.1(1) of the Federation Constitution uses the term "constituent peoples", which also appears in the Preamble of the Constitution of BiH. This is a term which, in the minds of many people, has a symbolic significance and is emotionally coloured, but which can hardly be said to have a clear and precise meaning. In the Federation Constitution, the naming of Bosniacs and Croats as constituent peoples presumably means that they were the peoples who played a special role in creating and developing the Federation, but it could also convey the idea that the Federation is primarily a territory of Bosniacs and Croats.

It is true that the Federation Constitution specifically provides that all refugees and displaced persons have the right to freely return to their homes of origin (Article II.A.3) and that all persons have the right to have property restored to them (Article II.A.4). Nevertheless, if a central provision in the Federation Constitution could reasonably make the Federation appear primarily as a territory of Bosniacs and Croats, this provision may well have a dissuasive effect on others, particularly on Serb refugees and displaced persons wishing to return to the Federation, and the emphasis placed on Bosniacs and Croats thereby contributes to preventing the realisation of an important objective of the Constitution of BiH.

For these reasons, I conclude that Article I.1(1) of the Federation Constitution is also not consistent with the prohibition against discrimination in the Constitution of BiH.

Dr. Hans Danelius
Judge
of the Constitutional Court of Bosnia and Herzegovina

ANNEX

Separate Opinion of Judge Zvonko Miljko on the Partial Decision of the Bosnia and Herzegovina Constitutional Court, No. U 5/98 of 1 July 2000

1. In accordance with Article 36 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, I would like to disclose and publicise the reasons behind my opinion, given the fact that I voted against the majority view.

This Partial Decision is related to the determination on the conformity of Article 1, as modified by Amendment XKIV of the Constitution of the Republika Srpska; Article I.1 (1) of the Constitution of the Federation of Bosnia and Herzegovina, as replaced by Amendment III; Paragraphs 1, 2, 3 and 5 of the Preamble of the Constitution of the Republika Srpska, as modified by Amendments XXVI and LIV with the Constitution of BiH. The issue here is a classical constitutional dispute, i.e. abstract decision-making on constitutionality. This case is related to the comparison and evaluation of the constitutional provisions of the Entities' Constitutions with respect to the Constitution of Bosnia and Herzegovina. This is why I consider it important to state all these provisions in full, and even state their formulation prior to the adoption of the amendments through which harmonisation with the Constitution of Bosnia and Herzegovina should have been achieved, in accordance with Article XII, Para 2 of the Constitution of Bosnia and Herzegovina.

Article 1 of the Constitution of the Republika Srpska reads as follows: "The Republika Srpska is the State of Serb people."

In formulation of Amendment XLIV, this Article reads as follows: "The Republika Srpska is the State of Serb people and of all its citizens."

Article I.1 (1) of the Federation of Bosnia and Herzegovina provides: "Bosniacs and Croats as constituent peoples, together with other citizens in exercising their sovereign rights, are reshaping the internal structure of the territory with Bosniac and Croat majority population in the Republic of Bosnia and Herzegovina, in the Federation of Bosnia and Herzegovina comprising of federal units with equal rights and responsibilities."

In the formulation of Amendment II, the challenged provision of Article I.1 reads as follows: "Bosniacs and Croats as constituent peoples, together with others, and citizens of Bosnia and Herzegovina from the territory of the Federation of Bosnia and Herzegovina, in exercising their sovereign rights, are reshaping the internal structure of the territory of the Bosnia and Herzegovina Federation as defined by Annex II to the General Framework Agreement in such a way that the Federation of Bosnia and Herzegovina is composed of federal units with equal rights and obligations."

Provisions of the Republika Srpska Constitution Preamble read as follows:

Arising from inalienable and non-transferable natural right of Serb people to self-determination, self-organisation and association, based on which they freely decide on their political status and provide for economic, social and cultural development.

Taking into consideration centuries-long struggle of Serb people for freedom and their readiness to establish relations of mutual respect and equality with other nations.

Taking into consideration their decision from the Second World War to constitute together with other nations, Croats and Muslims, the Republic of Bosnia and Herzegovina within the federal state of Yugoslavia.

Bearing in mind their determination to decide independently about their destiny and expressing their strong will to create a sovereign and democratic state, based on national equality, respect and guarantees of human freedoms and rights, social justice and the rule of law.

The challenged provisions of the Republika Srpska Preamble, as modified by Amendments XXVI and LIV, read as follows:

Arising from natural, taking inalienable and non-transferable right of the Serb people to self-determination allowing them, as any other free and sovereign people, to decide independently on their political and national status and to provide economic, social and cultural development: taking into consideration centuries-long struggle of the Serb people for freedom and national independence: expressing resolution of the Serb people to create a democratic state based on social justice, the rule of law, respect for human dignity, freedom and equality. Taking into consideration the natural and democratic right, willingness and resolution of the Serb people from the Republika Srpska to establish close and multiple relations between their state and other states of the Serb people: taking into consideration readiness of the Serb people to support peaceful and amicable relations among nations and states.

The applicant contended that the stated provisions of the Constitution of the Republika Srpska were not in conformity with the last paragraph of the Constitution of Bosnia and Herzegovina Preamble and Article II/4, II/6 and II/3 (b). of the Constitution of Bosnia and Herzegovina; whereas with regard to Article I.1 (1) of the Federation of Constitution of Bosnia and Herzegovina, the application argued that it was not in conformity with the last paragraph of the Preamble and Article II/4 and II/6 of the Constitution of Bosnia and Herzegovina.

The last paragraph of the Constitution of Bosnia and Herzegovina reads as follows:

Bosniacs, Croats and Serbs, as constituent peoples (together with others) and citizens of Bosnia and Herzegovina hereby determine the Constitution of Bosnia and Herzegovina.

Article II/4 of the Constitution of Bosnia and Herzegovina (Non-Discrimination) reads as follows: *Enjoyment of rights and freedoms stipulated in this article or in international agreements stated in Annex I of this Constitution is secured for all persons in Bosnia and Herzegovina without discrimination on any grounds such as gender, race, colour, language, religion, political or any other conviction, national or social origin, affiliation to some national minority, property, birth or other status*.

Article II/6 of the Constitution of Bosnia and Herzegovina reads as follows: *Bosnia and Herzegovina, and all courts, offices, state organs and bodies indirectly governing or operating*

within the entities, shall apply and respect human rights and fundamental freedoms stated in Para 2 hereof.

Article III.3 (b) of the Constitution of Bosnia and Herzegovina reads as follows: *Entities and all their lower units shall fully abide by this Constitution which abolishes those provisions of the Bosnia and Herzegovina laws and of the Entities' constitutions and laws that are in contradiction to the Constitution and decisions taken by the institutions of Bosnia and Herzegovina. General principles of international law are an integral part of the legal system of Bosnia and Herzegovina and its Entities*.

I hold that the stated provisions of Article II/6 and II.3 (b) of the Constitution of Bosnia and Herzegovina cannot be taken as a criterion of control in this constitutional dispute since they represent a constitutional obligation for the implementation and respect of human rights and fundamental freedoms; in other words, supremacy of the Constitution of Bosnia and Herzegovina and application of general principles of international law as an integral part of the legal system of Bosnia and Herzegovina and its Entities.

I cannot accept the view implied in the Decision that the challenged provisions of both Entity Constitutions *per se* violate the constitutional provisions contained in Article II/6 and III.3 (b) of the Constitution of Bosnia and Herzegovina.

What remains are the provisions in the last paragraph of the Preamble and Article II/4 of the Constitution of Bosnia and Herzegovina. I shall resort to unique arguments regarding all the challenged provisions since, with some minor differences, this concerns the fundamental issue of the constitutionality of Bosnia and Herzegovina and its form of state organisation.

My fundamental dissension from the majority opinion is reflected by my belief that this constitutional dispute is primarily a problem of the state organisation of Bosnia and Herzegovina and not a problem within the domain of individual human rights and fundamental freedoms guaranteed by the Constitution of Bosnia and Herzegovina.

2. After the dissolution of the former Yugoslavia and gaining independence, Bosnia and Herzegovina consequently necessitated a new Constitution in order to regulate the newly established relations of a post-communist and transitory state under the newly arisen circumstances.

However, it should have resolved the crucial problem of its statehood and constitutionality- to define constitutionally its own state organisation. Unfortunately, all this did not occur in a peaceful environment but during a wartime period, while the international community had the prevailing influence on the resolution of this situation.

Some points in theory are taken as axioms. Thus, it is freely claimed that federalism does not call for multi-nationality, but that multi-national states necessarily require some form of federal government structure.

Also, *per definitionem*, there is no federation without two or more federal units. Constituent elements of a federation are citizens (unity) and federal units (particularity).

Theoretical distinction lies in the relationship between federalism and democracy. While some put an equation mark between them, others claim that federalism negates the fundamental postulate of democracy expressed in the principle "one man-one vote".

Bosnia and Herzegovina is being federalised on special terms. As a result thereof, we have a complex state structure that is characterised by a three-degree constitutionality and great asymmetry.

The Constitution of the Federation of Bosnia and Herzegovina, preceding the Constitution of Bosnia and Herzegovina, is a result of the Washington Agreement by which Bosniac and Croat population as "constituent peoples, together with others, as well as citizens of Bosnia and Herzegovina (…) reshaped the internal structure of the territory with Bosniac and Croat majority population (...) in the Federation of Bosnia and Herzegovina composed of federal units with equal rights and responsibilities". (Article I.1. (1).)

The entire constitutional structure of the Constitution of the Federation of Bosnia and Herzegovina is precisely based on this duality of Bosniacs and Croats, and it is particularly reflected in the composition of the bodies of the state authority and decision-making methods. Article 1.2 .of the Federation of Constitution of Bosnia and Herzegovina provides that the names of Cantons "shall be given exclusively after towns, centres of Cantonal authorities or by regional-geographic characteristics", but Article V.3 mentions "Cantons with Bosniac or Croat majority population". Amendment I to the Federation Constitution introduces "Cantons with a special regime" dominated by the principle of parity of Bosniac and Croat representatives in governmental authorities.

Article 1.2 (2) of the Constitution of the Federation of Bosnia and Herzegovina provides that "the decision on constitutional status of the territory of the Republic of Bosnia and Herzegovina with Serb majority population will be made in the course of peace negotiations and at the International Conference on the former Yugoslavia".

Instead of "dividing the entire Bosnia and Herzegovina in Cantons in Dayton" (thus, in addition to the Croat Republic of Herceg-Bosna, the Republika Srpska would have been abolished as well as the (title) Republic of Bosnia and Herzegovina; thereby the entire country could have been named the Federation of Bosnia and Herzegovina!), the Republika Srpska was recognised as the second Entity and the name of the Republic of Bosnia and Herzegovina deleted "to be officially renamed into Bosnia and Herzegovina"(Article I.1. of the Constitution of BiH).

3. Even though I agree that it is not the task of the Constitutional Court to participate in scientific debates, stated theoretical aspects (seen through the prism of historical events) cast more light on this problem.

However, I would like to revert to legal arguments. I underlined that an analysis can be done by a comparison of the challenged provisions of the Constitutions of both Entities with the last

paragraph of the Constitution of Bosnia and Herzegovina and Article II/4 of the Constitution of Bosnia and Herzegovina.

At the Court's session and during a public debate, much has been said about the issue of the legal character and effects of the Preamble and the notion of constituent status.

If we accept that the Preamble is an integral part of the Constitution, a more significant question is whether it has a normative character. A Preamble may have that character in rare cases, but it is quite clear that it must contain norms in that event. Five Judges were inclined to the viewpoint that the last paragraph of the Constitution of Bosnia and Herzegovina Preamble did not have normative character nor did it set any limitation or impose obligations on the Entities.

In this sense, the notion of constitutionality (variously interpreted in theory) must be understood as a constitutionally determined fact that Bosnia and Herzegovina is a multi-ethnic state, and that the three constituent peoples (together with other citizens of Bosnia and Herzegovina) in this provision of the Preamble are put in the context of adoption and enactment of the Constitution of Bosnia and Herzegovina. If the three peoples of Bosnia and Herzegovina are an expression of the particularity of its specific federalism, whereas citizens are an expression of collectiveness, the category "others" can only refer to representatives of other peoples living in Bosnia and Herzegovina. Provisions of the Framework Convention on Protection of National Minorities could possibly refer to them. To put it in simple terms, not a single representative of the three constituent peoples in Bosnia and Herzegovina can be treated in any regard as a representative of a national minority in his/her own state.

It remains to be seen whether the challenged provisions are in contradiction to Article II/4 of the Constitution of Bosnia and Herzegovina that is identical to Article 14 of the European Convention on Human Rights and Fundamental Freedoms.

This Article *ex plicite* provides that the "enjoyment of rights and freedoms (…) is ensured for all persons in Bosnia and Herzegovina without discrimination on any grounds…"

Evidently this provision concerns the rights of an individual character, protecting the rights of individuals and not groups as such, particularly not of (mega) groups of the type of nations (peoples) in a multi-ethnic state. The convention itself fails to provide *actio popularis*, and even when it concerns "group" applications, every individual within a group must prove to be a victim of a violation of his/her rights. This requirement has been confirmed by the case law of the European Court of Human Rights and we have to act accordingly. The acceptance of arguments in the application would consequently lead to a conclusion that the representatives of all peoples in the entire territory of Bosnia and Herzegovina are being deprived.

I feel the need to emphasise that thus far the Constitutional Court of Bosnia and Herzegovina has been extremely scrupulous regarding the protection of human rights and freedoms. Its up-to-date case law has undoubtedly proven that. However, the matter in question obviously pertains to the constitutional determination of governmental system of a complex multi-ethnic state. The Dayton's construction of the state of Bosnia and Herzegovina aimed to resolve the national issue, which was the crucial constitutional problem given the form of its governmental system.

Such complex and asymmetric construction has led to compromise solutions regarding the constitutional determination of national (singularity) and civil (unity). In this sense, I cannot accept the arguments behind the adopted Decision in the part related to institutional structures of Bosnia and Herzegovina.

According to the opinion of the majority of Judges of this court, "in an ultimate analysis surely there is no specific model of ethnic representation to constitute a basis for the provision on composition of Bosnia and Herzegovina institutions and corresponding electoral mechanisms, which would in regulation of the composition of Bosnia and Herzegovina institutions allow for a generalised conclusion that the Constitution of Bosnia and Herzegovina represents a territorial division of constituent peoples at the level of Entities."

I have already elaborated on a certain "structural" constituent discrepancy and asymmetry between the Washington and Dayton documents. I am inclined to the assertion that Article VII of the Constitution of Bosnia and Herzegovina is a paradigm to this situation, but these constitutional solutions and attempts to secure equality of peoples of Bosnia and Herzegovina through institutional structures of authority, by application of the principle of parity and consensual decision-making, cannot be treated as "special rights" or "a privileged position" of these peoples, which are supposed to protect them.

In this respect, references to the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination, the European Chapter for Regional Languages or Languages of Minorities and the Framework Convention for the Protection of National Minorities are totally beside the point and cannot be applied in this constitutional dispute to the situation in Bosnia and Herzegovina.

Also, I also disagree with the examples of Canada, Switzerland and Belgium, which are stated in the Decision. These examples could be used as an argument during a discussion, but by no means as deciding arguments in the reasons adduced for the judgment. Moreover, they all represent specific situations, often incomparable.

This is also related to the use of the Vienna Convention in contractual law. Most Judges see arguments for its application in the fact that "contrary to the constitutions of many other countries, the Constitution of Bosnia and Herzegovina is in Annex IV to the Dayton Agreement, which is an integral part an international agreement". It is true that after Dayton a question was raised in Bosnia and Herzegovina as to what was the Constitution in a material sense, and in which sources of constitutional law, norms of a constitutional character could be found. The question was also raised about a mutual relationship between the Constitution (Annex IV) and other Annexes (Annex X in particular), and if any of them has supra-constitutional character!? This issue raises yet another much more complex problem of the relationship between Bosnia and Herzegovina and the international community. I have no intention to go into that at this point. I shall conclude by saying that the Constitution of Bosnia and Herzegovina, regardless of all untypical features related to its adoption, "has begun its course" as the highest legal and political act of this country once it was promulgated. This is how I perceive it. Acceptance of the applicant's request would lead to a radical revision of the overall constitutional structure, not only of the Constitutions of the Entities but also of Bosnia and Herzegovina itself.

4. In addition, I would like to point to a situation related to a part of the Decision dealing with the facts of the case.

At a public hearing held in Banja Luka on 23 January 1999 the Court adopted a Conclusion to dismiss the request by the applicant's proxy to grant his proposal on hearing new witnesses and taking into consideration some statistical data. The prevailing opinion was that it concerned an evaluation (of discrimination) *de jure* and not *de facto*.

This Conclusion was adopted with seven votes in favour and two against.

At a public hearing held in Sarajevo on 30 June 2000 regarding the same issue, a contradictory conclusion was adopted, i.e. five votes to four. Reasons therein stated that the judge-rapporteur acted rightfully when he referred to Article 22 of the Rules of Procedure of the Bosnia and Herzegovina Constitutional Court, of which Paras. 5 And 6 read that a Report contains "ascertained factual and legal situation, i.e. disputed issues; and "a conclusion derived from ascertained factual and legal situation and based on the former determination on the merits of the application".

I hold that the provisions of this Article of the Rules of Procedure are of a general nature, and that the facts related to this type of constitutional dispute cannot be equalised with, for example, the facts of the case in an appeal.

I also believe that, by stating of Annex VII taken in conjunction with Article II. 3 and 5 of the Constitution of Bosnia and Herzegovina with reference to acquirement of the rights to freedom of movement and abode, property and religion, fall outside the scope of the application.

Otherwise, the reasons offered by the majority imply that the challenged provisions, *per se*, contain discriminatory elements that could discourage refugees and displaced persons from returning to their original homes and therefore they are not in conformity with this important objective of the Constitution of Bosnia and Herzegovina.

5. In regard to the character of the sovereignty of the Entities, an extensive explanation is given in the reasons adduced for this Decision. Important argumentation is also provided in the separate opinions. I would like to make special reference here to the provisions of the Preamble of the Constitution of the Republika Srpska regarding this problem, as well as part of the provision of Article I.1 (1) of the Constitution of the Federation of Bosnia and Herzegovina "in exercising their sovereign rights".

The judgment that the provisions of the Constitutions of the Entities, in part related to statehood and sovereignty, are unconstitutional could not be made by comparison with the provisions of the last paragraph of the Bosnia and Herzegovina Preamble and Article II/4, as well as Article II/6 and III.3 (b) of the Constitution of Bosnia and Herzegovina.

Such a conclusion could perhaps be drawn in relation to paragraph 6 and Articles I.1 and I.3 of the Constitution of Bosnia and Herzegovina. On one side, however, that would be outside the scope of

application and on the other, it would contradict the fact that the Constitutional Court of Bosnia and Herzegovina does not act *ex officio*.

Dr. Zvonko Miljko
Judge
of the Constitutional Court of Bosnia and Herzegovina

A N N E X

Separate Opinion of Judge Snežana Savić on the Partial Decision of the Constitutional Court of Bosnia and Herzegovina, No.5/98 of 1 July 2000

Mr. Alija Izetbegović, at the time Chair of the Bosnia and Herzegovina Presidency (by his application of 6 February 1998), instituted proceedings before the Constitutional Court of Bosnia and Herzegovina on the conformity of the Constitutions of the Republika Srpska and the Federation of BiH with the Constitution of Bosnia and Herzegovina, failing to state therein which articles of the Constitutions of the Entities he found disputable and which Articles of the Constitution of Bosnia and Herzegovina, in his opinion, were contradicted by these Constitutions.

On 31 May of the same year Mr. Izetbegović submitted a new application, requesting that the Constitutional Court of Bosnia and Herzegovina examine the following provisions of the Constitutions of the Entities:

A) Regarding the Constitution of the Republika Srpska

a) Preamble in the part where the right of the Serb people to self-determination, respect of their struggle for freedom and state independence, and will and determination to establish links between their state and other states of the Serb people;

b) Article 1 – which defines the Republika Srpska as a state of the Serb people and of all its citizens;

c) Article 1 para 2 referring to the boundary line between the Republika Srpska and the Federation of BiH;

d) Article 4 stipulating that the Republika Srpska may establish special parallel relations with the Federal Republic of Yugoslavia and its Member Republics, as well as Article 68, para 1, item 16 stating that the Republika Srpska shall regulate and secures co-operation with the Serb people outside the Republic;

e) Article 6, para 2 stating that a citizen of the Republika Srpska cannot be extradited;

f) Article 7 in the part related to the official use of the Serbian language and Cyrillic alphabet.

g) Article 28, para 4 stipulating that the state should provide for financial support to the Orthodox Church and establish co-operation with the Church in all fields, especially in preservation, fostering and development of cultural, traditional and other spiritual values;

h) Article 44, para 2 providing that foreign citizens and stateless persons may be granted asylum in the Republika Srpska.

i) Amendment LVII, item 1, supplementing the chapter of the Constitution on Human Rights and Freedoms, according to which, in case of discrepancies in the provisions on rights and freedoms of the Republika Srpska Constitution and the corresponding provisions of the Bosnia and Herzegovina Constitution, those provisions that are more favourable for individuals shall be applied;

j) Article 58, para 2, Article 68, item 6 and provisions of Article 59 and 60 referring to various forms of property, holders of property rights and the legal system regulating the use of property.

k) Article 80, as modified by Amendment XL, item 1 stipulating that the President of the Republika Srpska carries out his/her work in the domain of defence, security and relations with other states and international organisations, Article 106, para 2 stipulating that the President of the Republika Srpska appoints, promotes and dismisses army officers, military court judges and prosecutors;

l) Article 80, as modified by Amendments XL and L, item 2 stipulating that the President of the Republika Srpska is authorised to appoint and dismiss heads of representative offices of the Republika Srpska abroad and to propose ambassadors and other Bosnia and Herzegovina representatives abroad from the Republika Srpska, as well as Article 90, as supplemented by Amendments XLI and LXII, empowering the Government of the Republika Srpska to decide on establishment of representative offices of the Republika Srpska abroad;

m) Article 98 stipulating that the Republika Srpska shall have a National Bank, as well as Article 76, para 2, as modified by Amendment XXXVIII, Item 1, para 2 assigning the National Bank competencies to propose laws in the domain of monetary politics and

n) Article 148, as modified by Amendments LI and LXV, empowering the authorities of the Republika Srpska to adopt acts and undertake measures for the protection of rights and interests of the Republika Srpska against acts of Bosnia and Herzegovina or institutions of Federation of BiH.

B) Regarding the Constitution of Federation of BiH

a) Article I.1 (1) which refers to Bosniacs and Croats as constitutive peoples and of their sovereign rights.

b) Article 1.6 (1) which states that Bosnian and Croatian are the official languages in the Federation of Bosnia and Herzegovina.

c) Article II. A.5 c), as modified by Amendment VII, in the part referring to dual citizenship.

d) Article II. a) stipulating the competence of the Federation of BiH to organise and conduct the military defence of the Federation and

e) Article IV B.7 a) as well as IV.B.8 stipulating that the President of the Federation of BiH is authorised to appoint heads of diplomatic missions and army officers.

2. The application was submitted to the People's Assembly of RS and the Federation of BiH Parliament on 21 May 1998. The People's Assembly of RS submitted its reply in a written form, whereas the House of Representatives of the Parliament of Federation of BiH submitted its reply on 9 October 1998.

3. At the session of the Constitutional Court held on 28 and 30 January 2000, the Constitutional Court, without the participation of the judges from the Republika Srpska, adopted the first Partial Decision in this case ("Official Gazette of Bosnia and Herzegovina", No. 11/00; "Official Gazette of the Federation of BiH", No. 15/00 and "Official Gazette of RS", No. 12/00).

4. At the session of the Constitutional Court held on 18 and 19 February 2000, without the participation of the judges from the Republika Srpska, the Constitutional Court adopted the second Partial Decision on the subject in question ("Official Gazette of Bosnia and Herzegovina", No.17/00, "Official Gazette of the Federation of BiH", No. 26/00).

5. Having conducted a public hearing on the issue on 29 June 2000, deliberations and voting were proceeded with at the Court's session of 30 June and 1 July 2000, with specific reference to the following provisions of the Constitutions of the Entities:

Regarding the Constitution of the Republika Srpska

1. The Preamble, as supplemented by Amendments XXVI and LIV, in the part referring to the right of the Serb people to self-determination, respect for their struggle for freedom and state independence, and their will and determination to establish ties between their state and other states of the Serb people (Paragraphs 1, 2, 3 and 5).

2. Article 1, as supplemented by Amendment XLIV, stipulating that the Republika Srpska is a state of the Serb people and of all its citizens.

Regarding the Constitution of the Federation of BiH

1. Article I (1), as replaced by Amendment III, referring to Bosniacs and Croats as constituent peoples and exercising of their sovereign rights.

At the same session, the Constitutional Court of BiH by a majority of votes (5:4) decided that the stated provisions of the Constitutions of the Entities, as well as Paragraphs 1, 2, 3 and 5 of the Preamble of the Constitution of the Republika Srpska were unconstitutional and cease to be in effect on the date of publication of this Decision in the "Official Gazette of BiH".

Based on the above and in accordance with Article 36 of the Rules and Procedures of the Constitutional Court ("Official Gazette of BiH", Nos. 2/97, 16/99 and 20/99), i.e. in view of my voting against the said Decision, I hereby give my separate opinion.

A) Regarding the admissibility of the application:

1. The Constitutional Court of BiH and the judge-rapporteur, in response to an application in the case U 5/98, acted contrary to the following provisions of the Rules of Procedure of the Constitutional Court: Articles 13, 14 and 19.

Namely, Article 13 of the Rules of Procedure of the Constitutional Court, paragraph 2 provides: "A submission referred to in the preceding paragraph is considered to be received on the date of receipt by the Court; that is, on the day of registered mail posting". The case U 5/98, the decision draft and already adopted and publicised Partial Decisions on the case state that the application was submitted on 12 February 1998 and supplemented on 30 March 1998. This statement is untrue since it is evident from the case documents that one application was submitted on 6 February 1998 and the other on 31 May 1998. Also, from the application submitted on 31 May 1998, it is not apparent that it concerned a supplement to the initial application, as stated in the Draft Decision and accepted by the Court in the course of ruling. Instead, the text of the application must lead to the conclusion that it is an entirely new application.

2. If the view taken by the Court that it was a supplement to the application was to be accepted, it would raise the question whether the supplement was made in accordance with Article 19 of the Court's Rules of Procedure, which provides as follows: "When a request, i.e. an appeal addressed to the Court is incomplete or fails to contain information necessary for conductance of proceedings, the Judge Rapporteur shall request the applicant to remove the deficiencies within a certain time limit that will not exceed a period of one month. If the applicant fails to do so, the application in question, i.e. the appeal shall be rejected", i.e. whether the Judge Rapporteur requested the complaint to be supplemented or it was done on the complainant's own initiative. The case documentation does not indicate whether the Judge Rapporteur requested supplementation of the complaint. This leads to the conclusion that it was done through self-initiative. However, the text of the complaint does not lead to the conclusion that it concerns a supplementation of the complaint but, on the contrary, that it concerns an entirely new request. Even in the case of accepting the supplementation of the application of 6 February 1998, the question is whether the supplementation was carried out in a timely manner. This question further implies another question whether the stated Articles 13 and 14 of the Rules of Procedure of the Constitutional Court were violated given the time limits. I hold that in this instance Article 13 and 14 of the Rules of Procedure of the Constitutional Court were violated.

3. According to Article 14, para 1 of the Constitutional Court's Rules of Procedure, a request for institution of proceedings under Article VI/3 (a) of the Bosnia and Herzegovina Constitution should, *inter alia*, contain "… provisions of the Constitution which are deemed to have been violated, signature of an authorised person verified by the seal of the applicant". The signature of the submitter in both applications (of 6 February and 31 May 1998), at that time the Chair of BiH Presidency, was not verified by a seal, which was in contradiction to the said Article of the Rules of Procedure of the Constitutional Court.

In addition to this, according to Article I.6 of the Constitution of BiH Article 9, item 4 of the Law on BiH Coat-of-Arms ("Official Gazette of BiH", No. 8 of 25 May 1998), it is provided that the BiH Coat of Arms shall be officially displaced and used in the following manner: "…In official correspondence, invitations, business cards and similar documents used by the members of the BiH Presidency, the Council of Ministers..." and the same Article under Item 2 provides: "in all cases referred to in the preceding paragraph, any other coat of arms shall not be used along with the BiH Coat of Arms".

The application of 31 May 1998, when the said Law entered into force, was not submitted in accordance with the stated provisions of the Constitution of BiH and the Law on BiH Coat-of-Arms, but was instead accompanied by a memorandum not symbolising BiH (as well as the application of 6 February 1998). I hold that there are two formal deficiencies in regard to the application: 1) Use of a non-existent BiH Coat of Arms, i.e. a coat-of-arms not symbolising BiH, the use of which is explicitly forbidden by the Constitution of BiH and the Law on the BiH Coat-of-Arms; and 2) Non-existing seal, prescribed as obligatory by the given provisions of the Rules of Procedure of the Constitutional Court. This lack of correct formalities raises the question whether Mr. Izetbegović submitted his application as a member of the Presidency of BiH or as a BiH citizen, which is not permitted by the Constitution of BiH in disputes of this kind. (Article VI.3. (a)). Given the aforementioned, the present case may be concluded to concern a lack of right of action for the institution of such proceedings and that the application, as such, should have been rejected.

4. The application under Item 1 states that the provision of Article 1 of the Constitution of the Republika Srpska (as defined by Amendment XLIV) is not in conformity with the Constitution of BiH (a general assertion, non-existent according to the Court's Rules of Procedure), only later to ascertain the following: "the last paragraph of the Preamble, Article II/4, II/6, 3b etc". It is evident from the stated assertions that the application, in this particular part, is not composed in conformity with Article 14, para 1, item 2 of the Rules of Procedures of the Constitutional Court. In other words, reference is made to a violation of Article 3b and the abbreviation "etc.", which is non-existent in the Constitution of BiH. These points raise the question on what is the reference made to – namely, what is the basis for the examination of the conformity of the stated provisions of the Constitution of the Republika Srpska with the Constitution of BiH by the Constitutional Court of BiH.

5. Moreover, in reference to the Constitution of Federation of BiH, Item 2 of the application states that Article 1.6 (1) is not in conformity with the last paragraph, failing to indicate of what - (Preamble, Article, Paragraph?) and by extension with Article II.4 of the Constitution of BiH, unlike Item 1 of the application where it is precisely stated "with the last paragraph of the Preamble". However, every point of the application, since it can be taken as a separate application (the Constitutional Court confirmed that by its partial decisions with regard to certain points), must be viewed as part of the whole and individually and must contain all relevant information laid down by the Rules of Procedure of the Constitutional Court (Article 14).

As the Constitutional Court, in accordance with Article 26 of its Rules of Procedure, examines only instances of violations disclosed in an application, it is evident that if the court were to act by thus formulated points of the application it would be in the situation of formulating an application by itself. In other words, it would establish its foundation, assuming what the applicant had requested, i.e. which norms of the Constitution of BiH needed to be examined in terms of conformity.

6. In addition, Item 1 of the application, with reference to the harmonisation of the Constitution of the Republika Srpska with the Constitution of BiH, states that the following parts of the Preamble of the Constitution of the Republika Srpska (as determined by Amendments XXVI and LIV to the Constitution of the Republika Srpska) are not in conformity with the stated provisions of the Constitution of BiH… In this case, the question raised is with which provisions. If we take the generally accepted view that a preamble does not have a normative character and therefore is not a norm – thus, in a formal sense, it is not a provision even though it may be a constituent part of a constitution in general. This is not disputable because it concerns the constitution which is at the same time both a legal and political act. We can arrive at the conclusion that in this case the Preamble of the Constitution of the Republika Srpska is challenged solely in regard to Articles II.4 and II.6, but not in relation to the Preamble of the Constitution of BiH since it is not explicitly stated anywhere. Furthermore, Article 3b of the Constitution of BiH, formulated as such, does not exist in the Constitution of BiH.

In this sense, the arguments disclosed in the application regarding this point and with reference to the Preamble of the Constitution of BiH cannot be accepted as grounds for a decision, i.e. a judgment on the constitutionality, since the Preamble cannot be assigned the character of a norm in legal terms.

7. In addition, under Item 12, paragraph 2 of the application regarding the harmonisation of the Constitution of the Republika Srpska with the Constitution of BiH, Amendment LXI to the Constitution of the Republika Srpska in relation to the Constitution of BiH is challenged, without stating a concrete Article of the Constitution of BiH as the grounds for determining its constitutionality. This challenge is also in contradiction to the provisions of Article 14 of the Constitutional Court's Rules of Procedure.

8. The obligation of the Entities to amend their Constitutions in order to ensure their harmonisation with the Constitution of BiH, as provided for by Article XII of the Constitution of BiH, is an issue of a constitutional character and the submitter of the application cannot refer to this competence of the Constitutional Court, as presented by the judge-rapporteur in the Draft Decision. It is an issue of the implementation of the Dayton Peace Agreement and authorities and institutions in charge of its implementation. The Constitutional Court of BiH does not act *ex officio* and is authorised to act only in those cases set forth in Article VI of the Constitution of BiH. However, upon an application by an authorised proposer, the Constitutional Court may examine the conformity of some paragraphs of the Constitutions of the Entities in relation to some provisions of the Constitution of BiH, pursuant to its Article VI. The Court should refer to this type of competence in the process of adopting a decision. Therefore, there is no doubt that the Constitutional Court is competent to decide this dispute, but not in the stated terms and not in terms laid out in the application, neither formally nor substantially.

9. Irrespective of the fact that in its actions upon this application the Constitutional Court of BiH has conducted a number of activities, including a public hearing and adoption of two Partial Decisions, I was of the opinion and felt the need, given the open public hearing and my participation in the decision-making process in this case, to warn the Court of these deficiencies. And I did so at the Court's session. Despite the fact that the Court refused to accept my arguments with the explanation that deliberation was in progress, I believe that the judge-rapporteur, in accordance with Article 19 of the Rules of Procedure of the Constitutional Court, should have

warned the submitter of the application of certain deficiencies, which in accordance with the said Article of the Rules of Procedure should have been amended in accordance with those Rules of Procedures – within a month at the latest. Otherwise, I hold that the provided reasons constituted sufficient grounds to reject the application. But since the judge-rapporteur failed to act according to Article 19 of the Rules of Procedure, I have reached the conclusion that the Court was obliged, taking this fact in consideration (should it decide not to reject the said application), to request its supplementation, i.e. removal of deficiencies and irregularities. However, this failed to occur.

10. In regard to the statements made in the application for the institution of proceedings that would annul all the consequences thus far produced by the challenged provisions of the Constitutions of the Entities (this is often not possible with a majority of general legal acts), I consider that one should have insisted on a precise application, and since it was not done, this should have been underlined and correctly interpreted in the Court's Decision. Namely, the application does not ask for provisions of the Constitutions of the Entities to be declared null and void, but to be declared ineffective or annulled. The application is irregular in this respect. It is a generally known fact that general legal acts, as a rule, cannot be annulled (there is no *ex tunc* effect), but can only be declared unconstitutional and automatically cease to be in effect, which results in an *ex tunc* effect.

B) Decision on the merits of the application

1. Regarding the evaluation of the conformity of Article 1 of the Constitution of the Republika Srpska and Article I.1 (1) of the Constitution of the Federation of BiH with the last paragraph of the Preamble of the Constitution of BiH and Articles II/4 and II/6 of the Constitution of BiH, in regard to the Constitution of the Republika Srpska and Article II/4 of the Constitution of BiH, in regard to the Constitution of the Federation of BiH.

2. In regard to the evaluation of the compliance of paragraphs 1, 2, 3 and 5 of the Preamble of the Constitution of the Republika Srpska with the last paragraph of the Preamble of the Constitution of BiH and Articles II/4 and II/6 thereof.

I am of the opinion that the application should be REJECTED as ill-founded for following reasons:

1. In adopting a judgement on the above points of the application in the case U5/95, an issue of the legal nature of a constitutional preamble in general was raised at the very outset. This issue is extremely complex and it was important that the Court should take a view on it.

Having this fact in mind, I would like to point out that the constitution of any state, as the highest legal act and the foundation of a legal system as a whole constitutes a political and legal act. This is the only legal act in the entire legal system that contains political features in addition to legal ones. The main reason for this added feature lies in the fact that a constitution creates the foundation for a specific normative system – the legal system. In this sense, the constitution has the role of the basic norm of a legal system. Therefore, as an initial and primary legal act, it represents an act of creation and not an act of application of law.[1]

1[1] See H. Kelzen, *Opća teorija prava i države*, [General Theory of State and Law], Belgrade, 1998, p. 320, as well as *Čista teorija prava* [Pure Theory of Law], Belgrade, 1998.

In the formal sense of the word, a constitution "contains very much different elements besides norms, which represent constitutional norms in the material sense" and which are consequently binding. Namely, it is generally believed that "the traditional part of the instrument called constitution is a solemn introduction, the "preamble", which expresses political, moral and religious ideas that the Constitution intends to fulfil. Such introduction usually does not proscribe any norms of human conduct and thus it lacks legally relevant contents. It is more of ideological rather than legal character. Should it be discarded, the actual contents of the constitution would not change in the very least".[2]

Given the above, I think that it is significant to state the etymological meaning; that is, the origin of the word. Namely, according to the *Dictionary of Foreign Words and Expressions*[3], entry: Preamble, Belgrade, 1976, page 756, word *Preambulum* (lat.) means preface, introduction, for example in speech, figuratively – foreplay, hesitation, verbosity. On the other hand, the expression *Preambulare* (lat.) means making of an introduction, prepare, hesitate.

In the formal-legal sense, according to the term in the Encyclopaedia of Legal Terms: "Preamble is part of a legal act stating its objective basic principles, preceding concrete regulations contained therein. Preambles are most frequently formulated in the form of a long sentence with several separate paragraphs. It is also considered that the legal status of preamble is not quite clear –some hold that it is a political declaration and not a legal regulation and, as such, not legally binding; whereas others believe that preamble is a legal regulation, only with lesser legal force than other concrete regulations".[4]

Whichever of the stated views we are inclined to agree with, it is generally accepted (from the theoretical-legal point of view) that a preamble is not a normative statement, a statement of necessity in the legal sense of the word, and it cannot be binding in that sense. Viewed both theoretically and legally as well as from the position of the science on constitutional law, a preamble could be a link between being and needing (Sein and Sollen), between the world of normative (legal) and factual (political), the moment when conditions have been created for the transformation of a political will into a nation-building system, but also the moment when it has not risen to become the law and thus not binding.

In view of the above, it is deemed that an "introduction serves to provide more dignity to the constitution and enhance its efficiency. Appeals to God and the statement on protection of justice, freedom, equality and public welfare are typical for introductions. Accordingly, depending whether the constitution is more of democratic or autocratic character, it is represented in introduction as the will of people, or a ruler appointed by God's mercy. Thus, the USA Constitution reads: We, the people of the United States, in order to establish… (etc) we order and promulgate this Constitution for the USA".[5]

2. In lieu of the aforesaid, it may be noted that the situation with the Preamble of the Constitution of Bosnia and Herzegovina is, to a great extent, specific and similar. To be exact, the Bosnia and

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2[2] Ibid. pp. 322-3.

3[3] M. Vujaklija, *Leksikon stranih riječi i izraza* [Book of Foreign Words and Expressions], entry: Preamble, Belgrade, 1976, p. 756.

4[4] *Pravna enciklopedija,* odrednica *Preambula,* Beograd, 1979, str. 1070 (*Encyclopaedia of Legal Terms,* entry *Preamble,* Belgrade, 1979, p. 1070)

5[5] H. Kelzen, op. cit., p. 323

Herzegovina Preamble contains starting (basic) principles, objectives and aspirations of its creators, and especially their designation. Thus it reads as follows:

"Based on respect of human dignity, freedom and equality.

Dedicated to peace, justice, tolerance and reconciliation.

Assured that democratic organs of authority and just procedures best contribute to the creation of peaceful relations within a pluralistic society.

Aspiring to support general prosperity and economic development through protection of private property and enhancement of market economy,

Lead by objectives and principles of the United Nations Charter,

Dedicated to sovereignty, territorial integrity and political independence of Bosnia and Herzegovina in conformity with the international law.

Determined to secure full observance of the international humanitarian law,

Inspired by the Universal Declaration on Human Rights, the International Pact on Civil and Political Rights the International Pact on Economic, Social and Cultural Rights and the Declaration on the Rights of Members of National, Ethnic, Religious or Language Minorities, as well as by other human rights instruments.

Referring to basic principles agreed upon in Geneva on 8 September 1995 and New York on 26 September 1995

Bosniacs, Croats and Serbs, as constitutive peoples (in community with Others) and the citizens of Bosnia and Herzegovina hereby determine the Constitution of Bosnia and Herzegovina".

Having analysed this preamble, one may find that it contains the usual contents of a political character (expressing political will), whereas the last emphasised formulation (paragraph, as stated in the application) refers to the designation of subjects who took part in the promulgation of the Constitution of Bosnia and Herzegovina and who are also, through the representatives of the Entities, signatories to the Dayton Peace Agreement. In addition to Bosnia and Herzegovina, these signatories were its Entities on behalf of their constitutive peoples: the Republika Srpska on behalf of the Serb people and of all its citizens and the Federation of BiH on behalf of Bosniacs and Croats and other citizens of the Federation of BiH. Formulations from the stated preamble acquire legal dimensions only in constitutional provisions that formulate initiating principles and objectives and ensure their implementation in a legal sense in view of the normative needs, meaning norms as normative statements which are binding given the character of the legal system.

In this respect, referring to the constituent status of peoples in BiH based on the last paragraph of the Constitution of BiH, without reference to the concrete provisions of the Constitution of BiH prescribing how such constituent status is realised, is neither logical nor legally founded, particularly bearing in mind the scientific view that "people –for whom it is claimed that the constitution derives its origin from – become people in the legal sense only through the constitution. Hence people can be the source of a constitution only in the political and not in the legal sense".[1]

3. Its peoples did not originally enact the Constitution of BiH separately: Serbs, Bosniacs and Croats, but the Entities in which its people originally obtained their constituent status and whose

1[1] Ibid., p. 323.

representatives are enactors (signatories) to the Constitution of BiH. There is no Bosnia and Herzegovina outside the Entities; that is, it does not exist outside them in any segment of state authority. Therefore, there is no doubt that the constituent status of peoples in BiH is exercised through the Constitution of BiH, i.e. through its legal norms.

Namely, the mere fact that in the process of enacting the Constitution of BiH, besides the BiH representatives, two contracting parties – the Republika Srpska and the Federation of BiH took part (given the way in which Bosnia and Herzegovina as such was established) speaks enough of how constituent status is being exercised in it. The signatories to the Dayton Peace Agreement or, more precisely, the enactors of the Constitution of BiH, are not individual peoples of Bosnia and Herzegovina but Entities (peoples representatives in their organs) who, by enacting the Constitution of BiH and by the commitment formulated in Article 1 of the Constitution of BiH stipulating that BiH consists of two entities: the Republika Srpska and the Federation of BiH, guarantees that the constituent status of peoples is being exercised in them indirectly as well at the level of Bosnia and Herzegovina, in accordance with its Constitution. In any case, this is not disputable.

4. In these terms, the Preamble of the Constitution of BiH speaks of its peoples (citizens) and others, while the signatures of the Dayton Peace Agreement (and thereby the Constitution of BiH) are the Entities composing Bosnia and Herzegovina and in which their people exercise their original constitutionality. Based on the aforesaid, one may draw the conclusion that the constituent status of peoples at the level of Bosnia and Herzegovina is derived and not original, which is collaborated by its complex and to a great degree unique form of a system of government.

5. In addition, if we take into consideration the linguistic interpretation – lexical and grammatical analysis of the last paragraph of the Preamble of the Constitution of BiH which reads as follows: "Bosniacs, Croats and Serbs as constitutive peoples (in community with Others) and the citizens of BiH …", we shall arrive at the following conclusion:

Beside the terms Bosniacs, Croats and Serbs, two attributes (features) are used – constitutive peoples and the citizens of BiH, while we read in brackets "in community with Others". That means that in the last paragraph of the Preamble Bosniacs, Croats and Serbs are concurrently designated as constitutive peoples and citizens of Bosnia and Herzegovina. The question is why? Linguistic interpretations will lead us to a conclusion that Bosniacs, Croats and Serbs, as stated in the last paragraph of the Constitution of BiH Preamble, are concurrently constitutive peoples and citizens. This formulation is not accidental; it is necessary given the governmental system of Bosnia and Herzegovina because in the territories where they are not constitutional they are citizens and vice versa. This is why there is a statement in brackets (in community with Others); otherwise, there would be a question: why else would it be stated – (in community with Others) – to whom refers this term of reference of the Preamble. The reason for such terms of reference in the Preamble of the Constitution of BiH does exist and is reflected in the fact that all peoples are constitutive at the level of BiH, but not concurrently in both Entities. Thus, the same subjects in one Entity, in accordance with their respective constitutions, are constitutive peoples while in another one they are citizens and visa versa, whereas all of them are constituent at the level of Bosnia and Herzegovina. However, in any case it does not suffice that this is asserted in the Preamble of the Constitution, but it is important to see how these principles are further elaborated through the constitutional norms of the Constitution of BiH.

6. Only that which is of legal character is binding in law. Accordingly, in every judgment on the harmonisation of the Entity Constitutions with the Constitution of BiH only the relationship

between legal norms, i.e. constitutional provisions, would be competent to examine, and not its relationship with the Preamble which, in the present case, fails to have normative character (in the legal sense of the word) and any legal norm of the Constitutions of the Entities. As an issue of legal character cannot be compared and harmonised with an issue that is manifestly not of that character, it is not possible to compare directly the provisions of the Constitution of the Republika Srpska or of the Federation of BiH with the Preamble of the Constitution of BiH and evaluate their harmonisation since it would concern heterogeneous notions (elements). This distinction is particularly important since the legal theory and practice largely accept the view that constitutional preamble fails to entail legal character even though it is an integral part of constitution in general.

To this effect, I consider that it might be possible to request an evaluation of the harmonisation of the concrete provisions of the Constitution of the Republika Srpska and the Federation of BiH in relation to the concrete provisions of the Constitution of BiH, which prescribe (determine) how the constituent status of peoples is accomplished in BiH; i.e. that it is possible only to evaluate harmonisation of legal system elements (higher and lower legal norms). After all, that is the essence of the principle of law - in this case, constitutionality.

In support of the perception of the present situation stated in the application on the evaluation of constitutionality (in addition to presented scientific views), I would like to quote a relevant example from practice. Namely, the Arbitration Award of the Court of Arbitration on the dispute about an inter-entity boundary line in the area of Brcko of 14 January 1997, an unofficial translation by the OHR[2], in response to a request to accept the normative character of the Preamble, provides that "the Tribunal disagrees with that. First of all, it is true that the OOCM Preamble confirms commitments made by the parties to certain Agreed Basic Principles adopted prior to Dayton, one of those being that the ratio of 51:49% of territorial proposal by the Contact Group represents the basis for the agreement, subject to change upon mutual consent. Despite that, **the text of the Preamble is not by itself binding for the parties, their obligations are contained in the text of the OOCM…"**

7. Based on the abovementioned and with reference to Point 1 of the application (evaluation of the harmonisation of Article 1 of the Constitution of the Republika Srpska and Article I.1 (1) of the Federation of BiH with the last paragraph of the Preamble of the Constitution of BiH), it must be concluded that it does not derive from the constitution and, according to the presented views from legal science and practice, the application in that part does not provide for a basis of evaluation of the constituent status of the challenged Articles of the Constitutions of the Entities by the Constitutional Court of BiH.

Namely, Article VI.3 (a) paragraph 2 of the Constitution of BiH provides for the possibility that the Constitutional Court of BiH may evaluate the harmonisation of the legal elements of the Constitution valid in this complex legal system, i.e. the harmonisation of the concrete legal norms of the Entity Constitutions with the Constitution of BiH. This possibility is why Article 14 para 1 of the Court's Rules of Procedure stipulates precisely that an applicant must state the provisions of the Constitution of BiH deemed to have been violated.

8. The Preamble of the Constitution of BiH must be used for the interpretation of the normative text of the Constitution, that being its role and purpose. In another words, it should be interpreted as a means for the systematic, targeted and logical interpretation of constitutional norms instead of

[2] See in *Brčko - makaze nad pupčanikom* [Brčko - scissors over the umbilical cord], Belgrade, 1997, p. 82.

proceeding from its normative meaning, which does not exist in this case. Such an interpretation of the Constitution of BiH, in light of its Preamble, implies that it is necessary to establish the constitutionality of the three peoples at the level of BiH, but not in each of the Entities individually since all three peoples, in their Entities and at the level of BiH, exercise constitutionality without hindrance. If it were to be done differently, the basis for the existence of the Entities and the entire state structure and organisation of BiH, as a complex state community with elements of federal and confederate forms of governmental systems and with some (minor) elements of a joint state structure which may be designated as a union, would be brought into question.

If Bosniacs, Croats and Serbs were to be constituent peoples individually in both Entities, Bosnia and Herzegovina would not be a complex state union as stipulated by the Dayton Peace Agreement (and under the Constitution of BiH), i.e. the *raison d'être* for the Entities would cease to exist.

BiH continues to exist as a recognised state community but with a different state structure, as defined by the Peace Agreement itself, precisely the Constitution of BiH under Article I/1. This is why the constitutionality of peoples in Bosnia and Herzegovina is exercised in a specific way as determined by the Constitution of BiH and its legal norms and not by its Preamble. A general statement about constitutionality, derived from the last paragraph of the Preamble of the Constitution of BiH and reference to it without having a foundation in concrete norms that prescribe the form of BiH's governmental structure, says nothing of the exercise of such constitutionality.

9. The notion of constitutionality, known to science and explicable both from theoretical and practical aspects, must have contents that always depend on norms by which constitutionality is being exercised. Therefore, only an analysis of the legal norms of the Constitution of BiH can determine what kind of constitutionality exists, as well as the way in which these three peoples exercise it in Bosnia and Herzegovina and the Entities, and at the same time, determine any possible violation of that constitutionality by the Entities' Constitutions by an evaluation of the relations between the legal norms of the Entities and the Constitution of BiH.

10. The constitutionality of the peoples in any state cannot be exercised abstractly without legal norms, i.e. by disregarding them. Therefore, it is necessary to first see how the Constitution of BiH envisages the exercise of the constitutionality of its peoples in BiH, and then to claim whether it is threatened or not.

Firstly, by the provision stipulating that BiH consists of two Entities: the Republika Srpska and the Federation of BiH, as provided for under Article I, Point 3 of the Constitution of BiH. Then, the signatories of this Constitution are the Entities on behalf of their constituent peoples (power to promulgate a constitution). Furthermore, in the process of electing the members of the institutions of BiH, as well as in the process of their decision making, the parity principle of the peoples and Entities has been introduced, somewhere one and somewhere the other or both at the same time, in regard to the Federation of BiH – parity of Bosniacs and Croats, and in regard to the Republika Srpska – parity of Serbs in relation to the other Entity and the peoples in it at the level of BiH as a whole (for example, Articles IV, V, VI, VII of the Constitution of BiH). Also there are a series of provisions stipulating that BiH is a complex state union, particularly those provisions determining the competencies of BiH institutions – Article III/1 of the Constitution of BiH, but also the competencies of the Entities in it – Article III/2.3.

11. I hold that in order to illustrate the stated standpoint it is necessary to quote some views from a report by my respected colleague, Judge Zvonko Miljko. Namely, in his paper of 12 May 1998 in regard to this issue, on page 1, he stated that the constituent elements of a unitary state are its citizens; of a federation – federal units and citizens; of a confederation – independent and autonomous state members, and that in BiH, as stated on page 3 of the report, there is an ultra compound governmental system characterised by a hybrid nature, asymmetry, three-degree constitutionality etc.

Given the above, one may conclude with certainty that at the level of BiH all three peoples – Bosniacs, Serbs and Croats – are constituent through the Entities, which means that the constitutionality of peoples in BiH is being exercised in a specific way, permitted and established by the Constitution of BiH itself (Entity Constitutions must be harmonised with it). By signing the Dayton Peace Agreement, and thereby Annex IV to the Constitution of BiH, by agreeing to statement of the will of both Entities, i.e. their representatives on behalf of their peoples and Entities (and their constitutionality), constitutionality of those peoples at the level of Bosnia and Herzegovina was determined, indeed in a specific way, which is reflected in the form of its governmental system. Hence, the constitutionality of Serbs, Croats and Bosniacs. These peoples acquired constitutionality at the level of BiH through their Entities (where they already had it) by signing the Dayton Peace Agreement; that is, by enactment of the Constitution of BiH and agreement to such a form of a governmental system.

12. Because of the above, there is not a single BiH institution nor a function to which a BiH citizen, a representative of any of the three constituent peoples or of the category of Others – as defined by the Constitution of BiH – could be elected if he/she is not previously elected/delegated by the peoples of the Entities or their authorities on behalf of their peoples. It speaks for itself. All members of the BiH institutions are elected or appointed by the peoples of the Entities, or organs of those Entities, on behalf of the Entities or peoples in them. The same applies to the Judges of the Constitutional Court of BiH.

The Constitution of BiH, as well as the Constitutions of the Entities, contain a number of provisions which put other citizens of Bosnia and Herzegovina, through the protection of fundamental rights and freedoms, in an equal position, except in some segments of political capability (concretely: passive electoral right where, for example, the Constitution of BiH envisages that a candidate for a certain function at the level of BiH, on behalf on the Entities or their peoples, must be a representative of certain people), which is a result of the complex state structure of BiH .

13. If the intent is **to alter the Constitution of BiH**, i.e. to alter the form of its system of government which is, in my opinion, the essence of the application, it must then be done following the envisaged procedure and not through a decision of the Constitutional Court of BiH which under the Constitution of BiH (Article VI) is neither competent nor authorised to do so.

With respect to the statement on the continuity of BiH, it must be emphasised here that the peoples of BiH continued to be constituent in BiH but through a different formula, a different form of governmental system in relation to the former internationally recognised BiH, a formula not unknown to legal science and practice. In this case, a point must be made to the effect that, from the aspect of legal science, the constitutionality of peoples is not exclusively linked to a territory in terms of its realisation but to a rule. This is why the Constitution of BiH does not read: “in the

entire territory", as requested and interpreted in the application. As to state powers, it must be concluded that in BiH it is being exercised in a specific way. The Entities of BiH hold powers, only in different domains. The Constitution of BiH, Article III stipulates a division of competencies between BiH and the Entities. Other Articles of the Constitution stipulate that the institutions of BiH shall be established through a specific procedure, and that power is exercised through these institutions.

Due to this fact, the Entities are not only electoral bases or electoral units, as intended to be presented by the Court's Decision. Members of the institutions of BiH, on behalf of their Entities or peoples, depending on the type of institution or concurrently on behalf of an Entity and peoples since, in some of them, parity of Entity and people are represented, exercise powers on their behalf but to the benefit of BiH as a synthesis of Entities in certain competencies, but definitely not in all. The mentioned provisions of the Constitution of BiH secure this through a method of appointment and decision-making in the institutions of BiH, particularly through the clause on the protection of the vital interests of a people. Otherwise, the Entities would not have to exist at all.

In lieu of aforesaid, I deem that it is inappropriate to link constitutionality with the territory on which it is supposed to be exercised, failing to precisely define a way (model) of accomplishment. I also believe that it demonstrates very well the objective of this application.

Namely, in response to the application that instituted the proceedings before the Constitutional Court of BiH on 5 October 1998, and upon its insistence in accordance with the Court's Rules of Procedure, the House of Representatives of the Federation of BiH pointed out: "… that it supported the idea in the Declaration on the Human Right to a Political and People's Equality, Constitutionality of the Bosniac, Serb and Croat peoples in the entire territory of BiH". Accordingly, it appears that the request for constitutionality of all three peoples in the entire BiH territory is emphasised with a special reason. I take it that there is no need to prove that, in particular since the Constitution of BiH does not contain such formulation. The formulation contained in the Constitution of BiH, that Bosniacs, Croats and Serbs as constituent peoples (together with Others) and citizens promulgated the Constitution of BiH in its Preamble whose status I explained above, must be connected to constitutional provisions. This will demonstrate that the constitutionality of peoples in BiH is being exercised in a specific way, regulated by the quoted provisions of the Constitution of BiH and characteristic of all compound state organisations. The applicant knows this fact and it is why he does not ask for an investigation to be carried out in relation to the stated provisions of the Constitution of BiH, but instead insists in the application that: the establishment of constitutionality in the entire territory of BiH, failing to state in which way constitutionality is being threatened and precisely which provisions of the Constitution of BiH have been violated. Why? Because, according to the Constitution of BiH, that constitutionality, pronounced as a principle in the Preamble of the Constitution of BiH, exists but not as constitutionality of all peoples in the entire territory of BiH but at the level of BiH and through the Entities, in accordance with the Constitution.

However, if the constitutionality of all three people were to be exercised in the entire territory of BiH, as the applicant claims, it would essentially mean something else. This is why I would like to quote further statements from a reply of the House of Representatives of the Federation of BiH: "On that occasion, the House of Representatives forwarded a message recommendation to proposes the applicants authorised under the Constitution of BiH: the Presidency, the Council of Ministers

and the Parliamentary Assembly of BiH, to review the issue of the establishment of full equality and constitutionality of the Bosniac, Croat and Serb peoples in BiH and its both Entities".

Given the fact that the constitutionality of peoples as such exists in BiH as a whole, but not concurrently in both Entities (in an identical way), the objective of the said application is evidently the establishment of something that is non-existent and what is clearly stated in the response to the institution of proceedings before the Constitutional Court. Something that already exists cannot be established, as it was intended in the application for institution of proceedings: constitutionality of peoples in BiH envisaged by its Constitution. Therefore, the objective is to establish the constitutionality of all peoples in both Entities, i.e. throughout the entire BiH territory, and the Constitution of BiH **does not stipulate** this. An appropriate way to do so is described in a reply to the application, at the same time being the only possible one and which could be followed given there is a political will in both Entities, i.e. of constituent peoples in these Entities: "the President and Vice President of the Federation of BiH and the Government of the Federation of BiH are tasked, in co-operation with the competent institutions of BiH and the Republika Srpska, and with active participation of OHR, countries who are signatories to the General Framework Peace Agreement for BiH and other representatives of the international community, to institute a constitutional decision-making and harmonisation of essential issues on constitutionality of the Bosniac, Croat and Serb peoples in the entire territory of BiH and in both Entities".

The above-mentioned makes clear the intentions and objectives of the institution of proceedings before the Constitutional Court of BiH. This clarity can be further collaborated by the statement of a theoretician from the Federation of BiH, which reads as follows: "However, it appears that the frame of reference in the Preamble related to constitutionality of peoples in the entire territory of BiH **has not been consistently derived in the normative part of the Constitution**, in part regulating organisation of the state powers (BiH Institutions)"; "The formula on constituent peoples, particularly since constitutionality, **according to the normative part of the Constitution,** is territorialized, does not correspond to the historical being of BiH which was a multi-ethnic society without internal ethnic borders", "The formula on constituent peoples divided the citizens of BiH to those who belong to these peoples and to those who do not; thus the citizens who did not belong to constituent peoples were excluded, under the **Constitution**, from entitlement to some political rights (they do not have passive electoral rights to be elected to the BiH Presidency and the House of Peoples of the Parliamentary Assembly)", and that he finally expects that "**the Constitutional Court of BiH adopts decisions of special relevance to the BiH constitutional system**"[1]. Inevitably, one must pose a question here whether the Constitutional Court has competence (authority) to **harmonise the provisions of the Constitution of BiH with its Preamble - that is, to alter the constitutional system of BiH or to protect that Constitution**.

In political terms, the constitutionality of peoples has already been established by the very act of promulgation of the Constitution; in legal terms, it is being established by this constitution as a result of certain political will (power), **and not by the decision of the Constitutional Court empowered to safeguard the Constitution of BiH, and not to create or alter it**, as stated in the aforementioned quotation, i.e. to harmonise its normative part with its Preamble (this is questionable since I am of the opinion that there is no discrepancy). It is why it may be concluded that the Constitutional Court of BiH is asked to do something that falls outside of its competence (powers) and is not in compliance with the Constitution of BiH.

1[1] N. Pobrić, *Ustavno pravo* [Constitutional Law], Mostar, 2000, pp. 45, 322, 500.

14. Irrespective of the fact that all the above-said makes any further discussion unnecessary, I hold that, in this case, it is necessary to clarify that constitutionality is always linked to people and authorities, i.e. the power to promulgate constitution and to exercise power.[2] It is a well known fact that all three peoples in BiH, through their Entities where they have original constitutionality, promulgated the Constitution of BiH and that they represent the authorities as such. Therefore, again through the Entities and in accordance with the Constitution of BiH, they exercise power; in other words, all three peoples are constitutional, even though unique, as a result of a complex form of state organisation that is generally characteristic for all compound state communities.

Based on the above and provided assertions regarding the legal nature of preambles of any constitution in general, it must be concluded that the Entities' Constitutions may violate (threaten, jeopardise, prevent implementation of) the constitutionality of peoples in BiH only by a violation of certain norms of the Constitution of BiH, but not of the Preamble of the Constitution of BiH since it does not say anything in the legal sense, i.e. it does not prescribe the way in which constitutionality is achieved. The application did not mention that any of those provisions of the Constitution of BiH were violated.

Therefore, how can we know that something (in this case constitutionality) is being violated or jeopardised if we do not take as a starting point the provisions that define how (constitutionality) should be realised. The Preamble does not state anything about it; it is the starting point while the Constitution of BiH, i.e. its legal norms, prescribes mechanisms to achieve constitutionality. The application does not state that any of provisions of the Constitution of BiH is being jeopardised by the Entities' Constitutions. Can constitutionality be jeopardised by non-jeopardising mechanisms by which it is being achieved (realised)? Or is it possible to claim that it is being jeopardised, threatened and violated without saying concretely in which way and how it is being done? The application does not contain any indication of the Articles of the Constitution of BiH determining a method of achieving constitutionality, and which are being violated through the Entities' Constitutions in exercising constitutionality, but only a simple statement that the last paragraph of the Preamble of the Constitution of BiH is violated.

15. What are the Entities? Certainly not the electoral basis or electoral units, as it has been the intention to prove. Electoral units, formulated as such, do not have any power, i.e. do not exercise power since, except in the domain of election of their representatives and organs of authority, they have no competencies, particularly not those powers that have been assigned to the Entities under the Constitution of BiH. The Entities are much more than that.

Only the Preamble of the Constitution of BiH, stating that Bosniacs, Croats and Serbs as constitutive peoples and the citizens of BiH promulgated the Constitution of BiH, represents a (starting) basis, a principle for Article 1 of the Constitution of BiH that provides that BiH consists of two Entities. Therefore it is important that the constitutionality of peoples in BiH is exercised at the level of BiH in a manner that is in conformity with the Constitution of BiH and concurrently in the entities, which comprise BiH in accordance with the state organisation of Bosnia and Herzegovina. It is therefore logical that the Constitution does not have a provision on the Entities

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[2] H. Kelzen, op. cit., p. 321, emphasises that "the original constitution of a state is an act of the founders of the state. If a state was created democratically, the first constitution originates from the constitutional assembly, which is called *constituante* in French, which is what the term constitutionality of peoples is derived from, with the term constituent originating from Latin constitutivus, meaning: determined, basic, essential, objectively valid, constituent".

and constitutionality in them. This has been common knowledge and it was accepted by signing the Dayton Agreement, i.e. by the adoption of the Constitution of BiH. The Entities have undertaken to harmonise their Constitutions with the Constitution of BiH and this harmonisation is not the issue in dispute. However, they have undertaken to do so as the Entities in which people were already constitutional, and not as electoral units or anything similar. This is a framework of the competencies provided for the Entities under the Dayton Peace Agreement.

1. Opinion on the harmonisation of the Preamble of the Constitution of the Republika Srpska with the Preamble and Article II/4, II/3 (b) of the Constitution of BiH

Concerning the part of the application referring to the claim that "the following parts" of the Preamble of the Constitution of the Republika Srpska, as defined by Amendments XXVI and LIV thereto, "are not in conformity with the Constitution of BiH"; it may be concluded that two evaluations are requested by the application.

A) Evaluation of the conformity of the Preamble of the Constitution of the Republika Srpska with the Preamble of the Constitution of BiH.

B) Evaluation of the conformity of the Preamble of the Constitution of the Republika Srpska with Article II/4, II/6, II/3.b) of the Constitution of BiH, even though the application is imprecise since reference is made to Article 3.b) which does not exist in the Constitution of BiH.

Concerning the application regarding the admissibility of the stated points, the following conclusions may be reached:

1) In this case, it requests the provision of an evaluation of the conformity of a non-legal (political) element of an Entity Constitution with a non-legal element of the Constitution of BiH. If the character of the preamble of any constitution is as determined above, the application is not legally founded in this respect; more precisely, in light of the aforesaid, the application is not founded on the essence of legal system as such, i.e. on the principle of constitutionality (legality).

The Preambles of both Constitutions, as their political basis, are elaborate and acquire legal form through the concrete provisions of the constitution, which in a material sense, constitute its contents. Thus, given the aforementioned, which is also the view of legal science and practice, one may draw a conclusion that the Constitutional Court cannot evaluate the conformity between the preambles of two different legal acts. As there is no possibility to determine the harmonisation of the provisions of the Entities' Constitutions with the Preamble of the Constitution of BiH, which we have proved, there is even less possibility to evaluate the conformity between the Preamble of the Entity Constitution and the Preamble of the Constitution of BiH.

2. Is it possible to evaluate the conformity of the Preamble of an Entity Constitution with the said Articles of the Constitution of BiH?

Here we have a similar situation. Namely, it is a request to evaluate something that is not of a legal character (preamble) as opposed to something that has a legal character – the stated constitutional

provisions of the Constitution of BiH. If every legal norm is derived from a higher legal norm, which is not disputable (i.e. it is generally accepted) and it is basically the very essence of the principle of legality (constitutionality), it is logical that the Preamble of the Constitution of the Republika Srpska cannot be evaluated in relation to the constitutional provisions of the Constitution of BiH. It would be possible to evaluate only the conformity of the concrete provisions of the Constitution of the Republika Srpska with the particular provisions of the Constitution of BiH deemed to have been violated.

3. In regard to the part of the application related to the evaluation of the conformity of Article 1 of the Constitution of the Republika Srpska and Article I.1 (1) of the Constitution of the Federation of BiH with the stated Articles of the Constitution of BiH, the concrete disharmony of these Articles with the said provisions of the Constitution of BiH is not evident.

Namely, not a single formulation in the Entities' Constitutions brings the stated Articles of the Constitution of BiH into question, i.e. it does not bring into question their implementation given that all citizens in both Entities are equalised in all rights with the constituent peoples.

The said Articles of the Constitution of BiH are binding and discrepancies may exist in case when that the Entities' Constitutions act otherwise, i.e. contain contradictory formulations. Namely, in legal theory there is an understanding (mostly accepted) that a constitution in general contains "certain regulations, not only in regard to authorities and procedures for adoption of laws-to-be but also in regard to the contents therein (in this case, laws and constitution). These provisions may be either positive or negative. One example of a negative provision is the First Amendment to the Constitution of the United States of America: – The Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peacefully to assemble and to petition the Government for a redress of grievances".

The Constitution may also "determine that laws must have certain positive contents: thus it may be requested that certain issues, if regulated by the law, to be regulated in the way stipulated in constitution". For example, the Constitution of German Reich of 1919 (the Weimar Constitution) contains provisions related to the contents of future laws. Thus, Article 121 reads as follows: – "Legislation is to provide conditions for physical, mental and social up-bringing of illegitimate children which shall be equal to the up-bringing of legitimate children", – or Article 151: "The organisation of economic life must correspond to the principle of justice, aiming to secure to all human beings a life of dignity".

It is believed that there is a substantial technical difference between the provisions of a constitution that prohibit and those that lay down certain contents of laws-to-be; in this case, the Constitutions of the Entities. Namely, "as a rule, the first ones elicit legal character unlike the latter ones. If a legislative body issues a law whose content is prohibited by the constitution, all the consequences entailed in an unconstitutional law occur. If, however, a legislative body fails to enact a law prescribed by the constitution, it is difficult to anticipate legal sanctions for this omission".[3]

3[3] Ibid, p. 324

If we apply this scientific understanding to the present situation, we cannot see in what way the stated Articles of the Entities' Constitutions violate or contradict the stated provisions (Articles) of the Constitution of BiH.

As to the Republika Srpska, in support of the above we should quote the provisions of Articles 5 and 10 of the Constitution of the Republika Srpska, which stipulate that "the constitutional organisation of the Republika Srpska is based on: guarantees and protection of human rights and freedoms in accordance with international standards" and that "the citizens of the Republika Srpska are equal before the law and that they enjoy the same legal protection regardless of race, gender, language, national origin, birth, education, financial status, political and other convictions, social status or any other property".

The assertions that challenge the provision designating the Republika Srpska to be a state cannot be evaluated against the said Articles of the Constitution of BiH since the Articles in question are, in terms of their contents, incompatible with the challenged Article of the Constitution of the Republika Srpska. In regard to this Article, perhaps the formulation "state" could be challenged in relation to Article 1, Item 3 of the Constitution of BiH. However, in this case it is necessary to outline that the state organisation of BiH is complex and unique with elements of confederate and federal forms of state organisation. This complexity is why an answer to this question may vary depending on the various theoretical approaches and interpretations existing in this domain. Thus, in that case the Constitutional Court would find itself in a situation, having analysed and interpreted certain provisions of the Constitution of BiH stipulating its state organisation, to take a stand in regard to the state organisation of BiH and to find whether other Articles of the Entities' Constitutions bring into question the state organisation of BiH. In my opinion, this is not the case.

Lastly, the claim that the Preamble of the Constitution of the Republika Srpska has acquired normative character through amendment, which is determined as an integral part of the constitution, cannot be accepted. Namely, generally speaking, an amendment represents an improvement, correction, and supplement. By analogy, to amend something is to improve, correct, supplement. Amendment – modification in the form of a challenged act is implied by all means.

However, amendments to the Preamble of the Constitution of the Republika Srpska stipulate that they are an integral part of the Constitution, but they do not assign to the Preamble of the Constitution (which is an integral part of the Constitution as well) normative character, nor do they alone have that character. Therefore, the conclusion – "claim that these amendments make an integral part of the Constitution of the Republika Srpska automatically produce normative character of the Preamble" cannot be accepted as a basis for evaluation. The theory of state and law does not challenge the fact that a preamble is an integral part of a constitution in general and, in this case, amendments to it. The fact that the preamble does not constitute a normative part of the constitution is not challenged in terms of the preamble being obligatory – it is therefore not a norm unless strictly stipulated by the constitutional norm itself.

The same arguments may be used in reference to the Vienna Convention on the Law on Treaties, which ordinarily determines the character of a preamble and its role in the interpretation of a legal act, i.e. its normative part. In this case, however, it is being incorrectly interpreted and applied. Namely, this particular case does not concern the interpretation of the provisions of the Constitution where the Preamble could be of assistance in terms of the Vienna Convention, but rather, it

concerns the evaluation of the conformity between the Preamble of the Constitution of the Republika Srpska and the Preamble of the Constitution of BiH. Thus, the provisions of the Vienna Convention cannot be applied in this case. These provisions practically stipulate that legal acts, agreements in this case (which the Dayton Peace Agreement, apart from its specific features, is), should be interpreted through the provisions of this Agreement but in light of its subject and objective. This can be applied in the following manner: provisions of the Constitution of BiH must be interpreted in light of its Preamble and that is not disputable. However, it is disputable when, in the legal sense of the word, the Preamble is being interpreted in light of constitutional provisions. That is simply impossible. Consequently, we must conclude that, in this case, the situation is being reversed. If the case in question were to concern a violation of some Articles of the Constitution of BiH, such an interpretation of the Vienna Convention on the Law on Treaties would be acceptable since that is its purpose. On the contrary, it is even proof that the Preamble does not have normative character. The Preamble, therefore, may and should be used only as an instrument for the interpretation of the provisions of a certain act, but it cannot be interpreted by itself, isolated for constitutional norms. This is exactly what would happen if this Article of the Vienna Convention on the Law on Treaties were to be interpreted in this way and implemented.

4. In regard to the final text of the third Partial Decision based on the majority opinion of judges, I hereby state **my dissension and reserve**:

The application for the institution of the proceedings in regard to the evaluation of the conformity of the Preamble of the Constitution of the Republika Srpska and Article 1 of the Constitution of the Republika Srpska and Article I.1 (1) of the Constitution of the Federation of BiH referred to two aspects of unconstitutionality of these Articles:

A) Regarding the last paragraph of the Preamble of the Constitution of Bosnia and Herzegovina

B) Regarding Article II/4. II/6. III/3.b) of the Constitution of Bosnia and Herzegovina

In the process of evaluation of the Court (deliberation and voting), despite the fact that I, as a Judge, suggested that a separation should have been made in terms of the reasons for challenging the said Articles, this was not done. Instead, prior to the adoption of the Decision and following a proposal by the judge-rapporteur, it was decided to vote on the Decision's operative part and subsequently, depending on the merits of the Decision, to decide on the arguments. Due to this fact, the Court and the Editorial Board, at the session held on 3 August 2000, found themselves in a situation that it was impossible to determine the final text of the Decision on the basis of a proposed final Draft Decision by the judge-rapporteur and a separate opinion by Judge Hans Danelius. Accordingly, the Draft Decision, as provided for by Article 67 of the Court's Rules of Procedure, was returned to the Court's session.

The Court, at the session held on 19 and 19 August 2000, did not accept the arguments presented by the Editorial Board, nor did it accept mine as a Judge. This is why I hold it necessary to disclose them in my Separate Opinion.

Namely, the Draft Decision on the evaluation of the constitutionality of Articles 1 of the Entity Constitutions does not contain the Decision reached in terms of argumentation but the argumentation agreed upon by four Judges only. Since they do not constitute a majority, that

argumentation cannot be accepted as that of the Court. Namely, in the domain of the evaluation on the constitutionality of the stated provisions of the Entities' Constitutions, as pointed out by Prof. Dr Kasim Begic, President of the Court, when pronouncing the Decision of the Court, two evaluations (set of arguments) were used: "There are two types of arguments in regard to constitutionality of peoples; therefore, they have two aspects. One aspect is from the point of the Preamble of the Constitution of BiH and to this related organisation of BiH institutions, and the second aspect relates to collective and individual rights, implying that the status of representatives of one of constituent peoples cannot be the basis for discrimination at the Entity level, nor it can be the basis for discrimination in the enjoyment of an extensive scope of rights and freedoms guaranteed by the Constitution of BiH. Let me remind you that every constitutional court has its tasks, and so does the Constitutional Court of BiH. One of these tasks is to safeguard the Constitution, this being a prerequisite for a legal state; and another one that every constitutional court should be a special institutional guarantor of the protection of human rights and freedoms, this being a prerequisite for a democratic political system. I can claim that with these decisions the Constitutional Court of BiH has fulfilled both of its fundamental tasks".[4]

The reasons adduced for the Decision (the arguments) are elaborated on the founding basis that the majority of the Judges (5:4) votes in favour of the Decision that both Articles of the Entities' Constitutions are not in conformity with the last paragraph of the Preamble of the Constitution of BiH, nor with the said Articles of the Constitution of BiH. However, the separate opinion of Judge Hans Danelius indicates that he is not inclined to this Decision, particularly in terms of the arguments. Namely, Judge Danelius in his Separate Opinion pointed out the following: "There are two aspects of this Article that bring into question its conformity with the Constitution of BiH. On the one hand, it is the fact that the Republika Srpska is referred to as a "state"; and on the other hand, the fact that the Serb people are explicitly referred to as the people of the Republika Srpska – whereas this is not the case with the Bosniac and Croat peoples.

a) As to the first aspect, I explained in my commentary on the Preamble why I hold that it is not justified to refer to the Republika Srpska as a state. The same explanation applies, *mutatis mutandis*, to Article 1 of the Constitution of the Republika Srpska. Therefore, Article 1 of the Constitution of the RS does not conform to the Constitution of BiH in this regard.

b) As to the second aspect, the complainant first claims that a contradiction exists with the last paragraph of the Preamble of the Constitution of BiH. The said paragraph is an introduction to the text of the Constitution and reads as follows: "Bosniacs, Croats and Serbs, as constituent peoples (in community with Others) and the citizens of Bosnia and Herzegovina hereby determine the Constitution of Bosnia and Herzegovina".

The Preamble of the Constitution of BiH, *per se*, must be considered as part of that constitution. Concurrently, the Constitutional Court is empowered, in principle, to examine whether the Entities' Constitutions are in conformity with the Preamble. However, the prerequisite for the evaluation of non-conformity with the Preamble of the Constitution of BiH must be that a relevant provision of the Preamble has normative character, stipulating restrictions or imposing obligations on the Entities.

4[4] *Dani* (weekly papers), edition of 7 July 2000, p. 19.

The question arising here is whether Article 1 of the Constitution of the Republika Srpska, stating Serb and not Bosniac and Croat peoples, is in conformity with the said provision of the Preamble of the Constitution of BiH. In this respect, I hold it appropriate to take into consideration the contents and special character of the stated provision of the Preamble. As it appears from its formulation, the provision fails to contain any legal norm that would imply rights or obligations. The provision is not more than an introductory paragraph identifying those that adopted and promulgated the Constitution of BiH. That is the context in which Bosniacs, Croats and Serbs are designated as constituent peoples in community with Others, and who have, together with all citizens of Bosnia and Herzegovina, defined the contents of the Constitution.

Therefore, inasmuch as the stated provision designates the three peoples as constituent, it does so only in a context of adoption and promulgation of the Constitution of BiH. Thus, it cannot be considered that the stated provision lays down any regulation of normative character or that it establishes any constitutional obligations.

It follows that there are no sufficient grounds to conclude that Article 1 of the Constitution of the Republika Srpska is in breach of the last paragraph of the Preamble of the Constitution of BiH.

"For the same reasons already provided in regard to Article 1 of the Constitution of the Republika Srpska (see under II above), I hold that the last paragraph of the Preamble of the Constitution of BiH does not contain a normative rule that would lead to a conclusion that Article I.1. (1) of the Constitution of the Federation of BiH is not in conformity with this paragraph".

Given the aforementioned, there is the situation in which only four Judges have decided, as proposed in this part of the reasons (arguments) of the final Draft Decision, whereas five Judges decided differently, i.e. they have taken the view that the last paragraph of the Preamble of the Constitution of BiH does not have a normative character to which the applicant refers in terms of the constitutionality of peoples, but also the Judge Rapporteur in the Decision itself. This distinction is relevant as it implies different consequences in terms of the implementation of the Court's Decision, given that its reasons may be based only on the majority arguments in the course of decision-making.

In addition, the arguments in the final Draft Decision differ to a large extent from the ones presented at the Court's session and based on which it was decided, this is impermissible. For instance, the mention of the practice of the Supreme Court of Canada, the Declaration on Equality and Independence of the Republika Srpska of 19 November 1997, the practice of the Supreme Court of Switzerland etc., which were not discussed at the session of the Court held on 30 June and 1 July 2000.

Concerning the Declaration of the National Assembly of the RS of 19 November 1997, it is necessary to emphasise that it was only quoted by its name in an earlier Draft Decision, whereas in the final Draft Decision it is quoted. Since this failed to be done previously, it could not have been viewed to concern the Declaration adopted by the dissolved National Assembly of the RS and that consequently any decision by that Assembly could not have been valid and used in the Court's arguments. The final Draft Decision states that it concerns an official act, even though it evidently concerns an act which cannot be used as proof for two reasons: it is a political act, which in terms of the evaluation of constitutionality cannot be used as a relevant argument for the Decision, and since

it is an act having no legal power as it was adopted by the Parliament which was dissolved by the President of RS several months earlier. The act was published in Official Gazette on 19 November 1997, whereas emergency parliamentary elections were held on 21 November 1997, which sufficiently speaks for itself. I believe that the Constitutional Court of Bosnia and Herzegovina, as an important institution in BiH, should not use such arguments in the process of adopting decisions, and in this regard I express my dissension with the Decision.

Additionally, I consider it necessary to point out that the Court, having acted upon the application, applied provisions of Article 26 and 64 of the Rules of Procedure of the Constitutional Court and thus acted outside the scope of application, i.e. the nature of the instituted dispute. Namely, Article 26 of the Rules of Procedure prescribes that in the process of evaluation the Court deliberates solely on the violations stated in the application, i.e., that an explanation should contain ascertained factual situation and legal reasons for the decision; based on that, it was decided to take into consideration the proofs collected by the judge-rapporteur (contrary to an earlier Decision of the Court) which was confirmed by a new conclusion of the Court adopted at the session held on 1 June 2000. Given the nature of the dispute, the question raised here is whether the evaluation of constitutionality of any act in relation to a higher legal act – in this case the Entities' Constitutions in relation to the Constitution of BiH – can be based on factual conditions; that is, on anticipation and suppositions, or the evaluation on the harmonisation of normative elements of the legal system, higher with lower, as this is the essence of the principle of legality, i.e. constitutionality in this type of disputes before the Constitutional Court of BiH, is being performed. I hold that Article 64 of the Rules of Procedure takes into account all types of disputes that may be conducted before the Constitutional Court, whereas in this type, in agreement with the nature of constitutionality that is generally known (it is an abstract legal issue – dispute), a decision cannot be based on a factual situation or anticipation and suppositions, and that, in this case, Article 64 of the Rules of Procedure of the Constitutional Court was wrongly interpreted and applied.

Furthermore, I hold that the Decision adopted by the Constitutional Court at the sessions held on 30 June and 31 July 2000, particularly the part related to the concrete Articles of the Entities' Constitutions, which have been evaluated so as to be in non-compliance with certain Articles of the Constitution of BiH, should have stated the provisions of the Constitution of BiH deemed to have been violated, i.e. with which provisions the Entity Constitutions are not in conformity. According to Article 14 of the Rules of Procedure of the Constitutional Court, by analogy and according to Article VI/3 (a) of the Constitution of BiH, the Decision has to contain these provisions.

Lastly, I opine that such a Decision by the Constitutional Court of BiH, proclaiming the disputed provisions of the Entities' Constitutions as unconstitutional, has produced very dangerous and inappropriate effects. The Constitutional Court of BiH is empowered to safeguard the Constitution of BiH. However, it has failed to fulfil its duty having adopted such a Decision. This Decision, as was the objective of the application, has a direct impact on the state organisation of BiH. This is not a task of the Constitutional Court of BiH. The Dayton Peace Agreement, more precisely by Annex IV thereto, sets forth the state organisation of BiH – by the Constitution of BiH, and the Constitutional Court of BiH must protect it pursuant to Article VI of the Constitution of BiH.

The effects of this Decision may be clearly seen from the statement made to the public given on the occasion of the Court's Decision by the President of the Court: "There are two types of arguments in regard to constitutionality of peoples; therefore, arguments have two aspects. One is from the

point of the Preamble of the Constitution of BiH and to this related the organisation of BiH institutions…"

The Constitutional Court of BiH is not empowered to alter the Constitution of BiH, and consequently its Decisions should not affect "the organisation of BiH institutions"; that is, the state organisation and the Constitution of BiH. However, this is not the case here. Having adopted this Decision, the Constitutional Court made a precedent which paved the way for everything which cannot be achieved through other BiH institutions due to an ever-present clause on the protection of vital interests of a people implying a consensus, the very foundation of Bosnia and Herzegovina, to be done by its Decisions since Decisions are made by a simple majority only in this Court. Thus, instead of being the guardian of the Constitution of BiH, the Constitutional Court of BiH, in contradiction to the Constitution, has become a framer of the Constitution, a mechanism for the simplest method to alter the Constitution of BiH. I am of the opinion that this role is not good either for the Constitutional Court which strives to be and which is, according to the Constitution of BiH, a serious and important institution of BiH or for BiH itself, its Entities and its peoples.

This is also particularly relevant due to the fact that such a Decision of the Constitutional Court of BiH is not founded in law, in the nature of legal system, in the principle of constitutionality and in the legal arguments, but rather on violations of the Rules of Procedure of the Constitutional Court, "facts", statistics, predictions, assumptions, global aims, voluntary estimates etc. This statement having been made, the Decision is not founded in the Constitution of BiH.

By voting against this Decision of the Constitutional Court and not accepting its role of this nature, I am guarding the Constitution of BiH, which I believe is the task of all the other Judges of the Constitutional Court, irrespective of to which people they belong or from which Entity they were elected.

Prof. Dr. Snežana Savić
Judge
of the Constitutional Court of Bosnia and Herzegovina

A N N E X

Dissenting Opinion of Judge Vitomir Popović with reference to the Partial Decision of the Constitutional Court of Bosnia and Herzegovina
No. U 5-98 dated 1 July 2000

On 12 February 1998 Mr. Alija Izetbegović, in his capacity as the Chair of the Presidency of BiH, initiated proceedings for the evaluation of the conformity of the Constitution of the Republika Srpska and the Constitution of the Federation of BiH with the Constitution of BiH. On 30 March 1998 this request was supplemented by a new submission where the applicant stated the provisions from the Entity Constitutions that he deemed unconstitutional. He requested that the Constitutional Court assess the following constitutional provisions:

A – In the Constitution of the Republika Srpska

a) Preamble in the part referring to:

- The right of the Serb people to self-determination, on the basis of which the Serb people may decide on its political and state status,
- Respect for the struggle of the Serb people for freedom and state independence,
- Determination of the Serb people to build a democratic state,
- Respect for the natural and democratic rights, will and determination of the Serb people of the Republika Srpska to establish links between its state and other states of the Serb people, and
- Readiness of the Serb people to commit themselves to peace and friendly relations;

b) Article 1 stipulating that the Republika Srpska is the state of the Serb people and of all its citizens;

c) 19 other provisions of the Republika Srpska Constitution.

B – In the Constitution of the Federation of BiH

a) Article I.1 (1) stipulating that Bosniacs and Croats are constituent peoples;

b) Five other provisions of the Constitution of the Federation of BiH.

At its session held on 30 June and 1 July 2000, the Constitutional Court of Bosnia and Herzegovina adopted the third Partial Decision with 5:4 votes by which the Court decided to proclaim the following provisions or parts of provisions unconstitutional:

With reference to the Constitution of the Republika Srpska:

Paragraphs 1, 2, 3 and 5 of the Preamble, as supplemented by Amendments XXVI and LIV;

The wording "the state of the Serb people" in Article 1, as supplemented by Amendment XLIV.

With reference to the Constitution of the Federation of BiH

The wording "Bosniacs and Croats as constituent peoples along with Others and" as well as "in the exercise of their sovereign rights" in Article III.1 (1), as replaced by Amendment III.

At the same time, the Court decided that the "said provisions" would cease to be in effect on the day of publication of this Decision in the Official Gazette of BiH. Judges from amongst the Bosniac people and foreign Judges voted in favour of this Decision, while the Judges from amongst the Serb and the Croat peoples voted against this it.[1]

1 The following judges voted "For" this Decision: Prof. Dr. Kasim Begić and Azra Omeragić, Prof. Dr. Joseph Marko, Prof. Dr. Louis Favoreu and Hans Danelius, while the following judges voted "Against" this Decision: Prof. Dr. Vitomir Popović, Prof. Dr. Snežana Savić, Dr. Zvonko Miljko and Mirko Zovko. Judge Hans Danelius dissented in his opinion on agreement taking the position that the Preamble in the Constitution of BiH does not have a regulatory binding character but that it an is introductory paragraph saying that Serbs, Croats and Bosniacs, as constituent peoples along with Others, determined the contents of the Constitution.

Having accounted for the fact that I voted AGAINST the said Decision in pursuance of Article 36 of the Rules of Procedure of the Constitutional Court of BiH, I hereby present my dissenting opinion:

a) "<u>The problem related to the Constitution Preamble</u>"

1) The Constitutional Court has taken the view that "contrary to the constitutions of many other countries, the Preamble of the Constitution of BiH, as Annex IV to the Dayton Agreement and applying interpretation of the Vienna Treaty Convention, might be considered as an integral part of the Constitution".

Namely, I will commence my expose by stating that a Judge of this Court, Hans Danelius, as one of the Judges who voted FOR the Decision dissented in his opinion on agreement with the adopted Decision and has taken the clear position that "the Preamble of the Constitution of BiH does not contain any legal norm resulting in any specific right or obligation, so that this provision is nothing but an introductory paragraph which identifies those who adopted and enacted the Constitution of BiH. This is the context within which Bosniacs, Croats and Serbs have been identified as the constituent peoples along with Others and as those who, along with all the citizens of BiH, determined the contents of the Constitution. Accordingly, the said provision identifies three peoples as the constituent peoples only within the context of adoption and proclamation of the Constitution of BiH, so that this provision cannot be construed so as to establish any rule of normative character or to create any constitutional obligation. According to the opinion of this Judge, it follows that there are no sufficient grounds which would lead to the conclusion that Article 1 of the Constitution of the Republika Srpska violates the last paragraph of the Preamble of the Constitution of BiH".[2]

Therefore, in order to have such a conclusion of the Court on the legal nature and character of the Preamble of the Constitution of BiH incorporated in the final part of the Decision, it was necessary to have five out of the nine Judges voting in favour of the conclusion, and not Four judges, as was the case.[3]

Given these reasons, I consider that such a conclusion of the Court in fact represents the opinion of the Judge Rapporteur and not the position of the Court so that it should have been deleted from the final text of the Decision, as the Editorial Board properly noted.[4]

My personal position on this legal issue is identical to the position of my remaining four colleagues whose opinion is that the Preamble of the Constitution of BiH does not contain any legal rule of a normative binding character, but only "states" that Serbs, Croats and Bosniacs, as constituent peoples along with Others, are determining the contents of the Constitution, while legal norms in terms of their binding character are laid down in the normative part of the Constitution.

Regarding the remaining considerations on this legal matter, I fully share the opinion and take the position presented at the public hearings held in Banja Luka on 23 January 1999 and in Sarajevo on 29 June 2000 by the legal representatives and experts of the RS People's Assembly, Prof. Dr.

2See dissenting opinion of Judge Hans Danelius, page 4, paragraphs 1, 2 and 3.

3 Judges from amongst the Serb and Croat peoples voted against this conclusion and Judge Hans Danelius joined them with his dissenting opinion.

4 See the Minutes of the Court Editorial Board dated 3 August 2000, page 1.

Radomir Lukić and Prof. Dr. Petar Kunić. I also share the dissenting opinion of Prof. Dr. Snežana Savić in the part in which she analyzes this legal issue.

2) The Court has taken the wrong position "that, aimed at interpreting the legal nature and character of the Preamble, provisions of Article 31 of the Vienna Treaty Convention may be used – the Convention which established the general principle of international law and which is, in terms of Article III/3 (5) of the Constitution of BiH, an integral part of the legal system in BiH".

However, in order that the application of the Vienna Treaty Convention dated March 26 1996 could be discussed at all, it would be necessary to have this Convention integrated in the BiH legal system by ratification or in some other way. This necessity is also expressly provided for in Article 11 of the Convention, which reads:

The consent by a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession or by any other means if so agreed.

Thus, none of the envisaged manners for consent to be bound by a treaty exist in this particular case. Annex I to the Constitution of BiH provides for only supplemental human rights agreements which will be applied in BiH, while the Vienna Treaty Convention, in terms of Article III/3 (b), cannot be deemed a "General principle of international law or an integral part of BiH and Entity legislation".

Regarding the legal nature and character of the Constitution of the Republika Srpska, it is beyond dispute that the text of this Preamble, as modified by Amendments XXVI and LIV ("Official Gazette of the Republika Srpska", Nos. 28/94 and 21/96), is an integral part of the Constitution of the Republika Srpska, but it does not have a normative binding character. It is not a legal norm that the constitutionality of which could be evaluated at all. Assessment of constitutionality of a non-normative Preamble comparing it with other superior Preamble that is also non-normative is absurd in itself.

b) Constitutionality of peoples

In order to commence the discussion on this issue, it is necessary to first determine the meaning of the term "constitutionality of peoples" in legal theory and practice, in particular in terms of constitutional law. There can be no doubt that this term is also widely used beyond the law. Nevertheless, most legal theoreticians assume that it is "the power of people" to adopt a constitution and thus the power of people to "build a state". However, if we consider this term in light of the Preamble of the Constitution of BiH, we will reach the conclusion that the word "constitutionality" is derived here from the word *constitutio* which denotes constitution as the supreme legal act which regulates the foundations of the governmental and social system of a state. Legal science and rhetoric use the terms "constituent and constitutive" having the equal meaning.

Constitutionality of peoples in a state cannot be abstractly exercised without legal rules, i.e. without them. Therefore, it is necessary to see what the Constitution of BiH provides for the exercise of the constitutionality of peoples in BiH and only then determine if it is endangered or not.[1]

1[1] See details in dissenting opinion of Prof. Dr. Snežana Savić, page 13

First, by the provision stating that BiH consists of two Entities: the Republika Srpska and the Federation of BiH, provided for in Article I.3 of the Constitution of BiH, and then by the fact that its signatories are the Entities on behalf of their constituent peoples (the power to adopt the constitution). Furthermore, by the fact that parity of peoples and parity of the Entities (somewhere one, somewhere the other and somewhere both) are represented in the election of members to the institutions of BiH as well as in the manner of their decision-making; with respect to the Federation of BiH, this is the parity of Bosniacs and Croats; with respect to the Republika Srpska, this is the parity of Serbs in relation to the other Entity and peoples in it at the level of BiH as a whole (e.g. Articles IV, V, VI, VII of the Constitution of BiH). Then we have a series of provisions stipulating that BiH is a complex state, in particular those provisions which regulate the responsibilities of the BiH institutions – Article III/1 of the Constitution of BiH, but responsibilities of its Entities as well – Article III/2,3.[2]

Within this context I also fully accept the opinion that was presented by a Judge of this Court, Dr. Zvonko Miljko, in his report dated 12 May 1998. Namely, on page 1 of his report, he said that the constituent elements of a unitary state are its citizens; of a federation – federal units and citizens; of a confederation – autonomous and independent member-states, and that in BiH, as it is underlined on page 3 of the report, we have an extremely complex system of government characterized by hybridism, asymmetry, three-instance constitutionality and so on.[3]

Such a thesis is fully in line with the provisions of the Agreement on Implementing the Federation of BiH that was signed in Dayton on 10 November 1995. The general principles, i.e. already the first and second sentences therein, *inter alia*, regulate: "The complete establishment of the Federation of BiH is an essential prerequisite for peace in BiH. Without a strong and fully functioning Federation, as one of the two constitutive Entities of BiH, the proximity talks in Dayton cannot result in a lasting peaceful settlement".[4]

If we add here the fact that the Constitution of BiH, as Annex IV to the GFAP in BiH, was approved by the Federation of BiH "on behalf of its constituent peoples and citizens" and on behalf of the Republika Srpska, we will arrive at a conclusion that all three peoples – Serbs, Croats and Bosniacs are constituent at the level of BiH, but through the Entities. This conclusion exactly proves the thesis that there are no institutions and functions in BiH to which a citizen of BiH, as a member of any of the three constituent peoples or the Others, could be elected (as it is stipulated in the Constitution of BiH) without being prior elected and delegated by Entity peoples or Entity authorities on behalf of their peoples. All members of elected institutions in BiH are elected or appointed by people in the Entities or Entity authorities on behalf of the Entities or on behalf of their peoples. Besides, the six judges of the Constitutional Court of BiH were elected in that manner.

Apart from guaranteeing to all the citizens of BiH through the Constitution the highest level of internationally recognized human rights and freedoms provided for in the European Convention on Human Rights and Freedoms and Protocols thereto and other instruments for protection of human rights and freedoms precisely enumerated in Annex I to the Constitution of BiH, the Dayton Peace Agreement also contains some other agreements on the protection of human rights and freedoms,

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2[2] Ditto as in 1.

3[3] For details, consult the report by Dr. Zvonko Miljko of 12 May 1998, pages 1 and 3.

4[4] Agreement on Implementing the Federation of BiH signed in Dayton on 10 November 1995.

e.g. the Agreement on Human Rights as Annex VI to the GFAP, the Agreement on Refugees and Displaced Persons as Annex VII to the GFAP etc.

Namely, Article 1 of the Agreement on Human Rights provides, *inter alia*, that the parties-signatories to the Agreement shall secure for all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms, including the rights and freedoms provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols thereto and the other international agreements listed in the Appendix to this Annex.[5]

However, when analyzing the issue of the constitutionality of peoples at the level of the Entities, we have to recall some recent events. Namely, the "dissolution" of former Yugoslavia inevitably caused the dissolution of the Republic of BiH with all the consequences followed by the war between its constituent peoples. The Republika Srpska separated first and defined itself as "an independent state of the Serb people" and continued existing as such even following the international recognition of the Republic of BiH in April 1992; after that, the Republic of Herceg-Bosna separated as an independent state of the Croat people. These states functioned as real states given that they had "their" territories and "their" population and organized government in their territories. They were not internationally recognized but they had full so-called "internal sovereignty". Although internationally recognized within the borders of the former SFRY federal unit, the Republic of BiH could not establish any internal sovereignty in the territories of these two real states and its "external sovereignty" in relation to these territories was sterile and continued to be sterile until signing of the so-called "Dayton agreements". It can be clearly seen that the state "dissolution" of the Republic of BiH was in fact (in this respect) the "dissolution" of its constituent peoples. The reverse process – the process of the state reconstitution of BiH took place in absolutely the same "course".

Bosniacs and Croats first concluded the so-called "Washington agreements" and formed the Federation of BiH. Not only the Federation Constitution but also the constitutions of cantons comprising the Federation recognize only Bosniacs and Croats as constituent peoples.

There is no place (?) here for Serbs as constituent people and everything absolutely corresponds with the essence of the historical process that I refer to. Then, we had "negotiations on basic principles", first in Geneva on 8 September 1995 and then in New York on 26 September 1995 given that the Republika Srpska took part in these negotiations. One of the Agreed Principles in Geneva (Item 2.2) reads: "Each Entity (the Federation of BiH and the Republika Srpska) shall continue to exist under their respective Constitutions...", with the obligation that their Constitutions are amended to accommodate these principles.[5]

Nobody can challenge the fact that the Dayton Peace Agreement is based on the Geneva and New York Principles. The penultimate paragraph of the Preamble of the Constitution of BiH reads: "Recalling the Principles agreed in Geneva on 8 September 1995 and in New York on 26 September 1995…".

The Republic of BiH, the Federation of BiH and the Republika Srpska also participated equally in the conclusion of the Dayton Peace Agreement. Hence, peoples were represented by "states" and in

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5[5] See the Agreement on Human Rights as Annex 6 to the GFAP and the Agreement on Refugees and Displaced Persons as Annex 7 thereto.

5 For details, see the report by Mr. Marko Arsović, a former Judge of this Court.

that context the above mentioned declarations speak of an endorsement of the Constitution of BiH by the Entities.

Pursuant to all the above mentioned facts, it may be concluded that Serbs, Bosniacs and Croats are constituent peoples in accordance with the Constitution of BiH at the level of the state of BiH but that they are not constituent peoples according to the Constitution of the Republika Srpska at the level of the Republika Srpska or according to the Constitution of the Federation at the level of the Federation of BiH. Any other approach in consideration would lead to a negation of the existence of the Republika Srpska and the Federation of BiH and the transformation of BiH from a very specific complex *sui generis* state to a unitarian state which would not reflect what was envisaged by the Dayton Peace Agreement as an international agreement and thus the will of the Entities and its peoples. If the Republika Srpska is not the state of Serb people, as the request claims, why then does the Constitution of BiH (Article 1, Paragraph 3) recognize the name "the Republika Srpska" and what could be the meaning of the word "srpska" if not that it is the state of the Serb people; if in the Republika Srpska, Bosniacs and Croats would also be constituent peoples then certainly it could not have this name recognized by the Constitution. In that event, by analogy, it could be named "Serb- Croat –Bosniac Republic" and it could find the *gatio* of its existence. Why does the Republika Srpska have to be an "exclusive electoral unit" for five Serbs in the House of Peoples, one Serb to the Presidency of BiH etc., which is strictly prescribed by the Constitution of BiH?

c) <u>The State of the Republika Srpska…. – a form of governmental system in BiH</u>

As a state, Bosnia and Herzegovina is a highly unique or, better put, a model of a system of government unknown to the world. Many legal theoreticians think that it is one specific construction of a complex state consisted of one federation (the Federation of BiH) and one unitarian state (the Republika Srpska). The Constitution of BiH simply names this state as "Bosnia and Herzegovina", speaks of its sovereignty and territorial integrity, and assigns it a lot of functions and competencies of the state authorities. It would be very difficult to defend the position that this complex state is a federation or a confederation although it has both federal and con-federal elements that I do not want to discuss in this report. However, the majority of legal experts and theoreticians will agree that it is a *sui generis* state. Its Entities are, if viewed either from the federal or con-federal point of view, very decentralized. In particular, one cannot disregard the fact that its' Entities, which on behalf of its constituent peoples, together with the Republic of BiH, participated equally in the Dayton Peace process and "approved" the Constitution of BiH, are also organized as states even according to the Constitution of BiH itself. Consequently, these Entities have their own population, territory and they exercise power on the entire territory, they have their own army, police etc. True, they are not recognized internationally, Bosnia and Herzegovina is. But, isn't this international recognition more of a political than a legal act? The doctrine of international public law has taken the identical position on this issue. International recognition may be given to a state that is only politically but not legally legitimate. However, this principle position on the »value« of international recognition is not crucial to the issue of the statehood of the Entities of BiH. I have no dilemma with respect to the fact that the Entities are states, not independent states, but members of a complex state. Analysis of Article 1, paragraph 3 of the Constitution of BiH will lead us to the conclusion that the Constitution of BiH itself starts from the Entities as member states. According to this Article, BiH shall consist of two Entities, the Federation of BiH and the Republika Srpska (hereinafter: the "Entities"). The term "entities" originates from the Latin word *ens* which means "being", "relevance", and "essence". This term means that the sense of this provision is that BiH is composed of two state-legal beings: one Federation and one Republic. There is no doubt that the constitutional-legal terminology refers to the "Republic" and the "Federation" as states. A republic represents a form of governance in one state and a federation a form of a system of government.

Article 1, paragraph 7 of the Constitution of BiH stipulates: "there shall be …. and citizenship of each Entity". There is a justifiable question: Who, in addition to the state, can establish or grant citizenship? The answer is – no one. Article III, paragraph 3, item a) of the Constitution of BiH provides that all governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the Entities. It is beyond doubt that the reference here is made to state functions and powers in general and not only functions and powers of the "government" *stricto sensu*; that is, the government as the holder of executive powers only. The Entities are assigned not only executive but also judicial and legislative powers; I suppose this is not an issue at dispute. Then, how valid is the argument that the BiH Entities are not states since the Constitution of BiH does not expressly refer to them as states? If this Paragraph is analyzed carefully, it can be easily seen that, except for mere formalism, it also stands on tautological "footing". According to it, an Entity is not a state, it is simply an Entity. So, as Moliere had said it, "a dream is explained by virtue of sleeping". But we must pose a logical question to the advocates of such attitude: if it is actually not known what an entity means in public law, how is it possible to know that it is not a state? The term entity cannot be transformed into some kind of enigmatic "hide-and seek game" created for uninformed naïve persons or for informed manipulators. [6]

In addition to the above, one cannot disregard the fact that the Agreement on the Inter-Entity Boundary Line and issues related thereto as Annex II to the GFAP provides for full territorial integrity to the Entities. The boundary lines between the Entities have been precisely drawn on maps and, by virtue of Article 7 of this Agreement, they are an integral part of this Agreement and it is not possible to alter them without the consent of the Entities. There are many cases in practice where boundary lines between entities were changed with their consent.

The fact that the Entities are entitled to a high level of the right to "self-organization" is not disputable. Adoption of its own constitution and laws represents the highest level of this right. And "where we have a constitution", as my esteemed colleague Arsović says, "there must be a state".

Based on the above, it can be concluded that both the Republika Srpska and the Federation of BiH are states with limited sovereignty; in other words, they are not independent and internationally recognized but they are member states of one complex state.

d) <u>The Non-discrimination Principle</u>

The Court has taken the wrong view that Article 1 of the Constitution of the Republika Srpska violated the principle of non-discrimination contained in the provisions of Article II, paragraphs 4 and 5 and Article III, paragraph 3 b) of the Constitution of BiH. In other words, Article 1 of the Constitution of the Republika Srpska defines the Republika Srpska as the state of the Serb people and of all its citizens, which means it defines it both on ethnic and non-ethnic civic principle. Hence, the term constitutionality, as I stated in my introduction, implies the right of Serbs, as the majority people in the Republika Srpska, to adopt a Constitution and to define their own state by that Constitution, must be separated from human rights that are in the broadest possible terms guaranteed to all citizens. Article 10 of the Constitution of the Republika Srpska explicitly provides that "citizens of the Republika Srpska shall have equal freedoms, rights and responsibilities; they shall be equal before the law and enjoy the same legal protection regardless of race, sex, language, national affiliation, religion, social origin, birth, education, property status, political and other beliefs, social status and some other personal characteristic".[7]

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6 For details, see the report by Judge M. Arsović.

7 Constitution of the Republika Srpska, Article 10.

Not only does the Constitution of BiH provide, through the application of the European Convention on Human Rights and Freedoms and Protocols thereto and other instruments listed in Annex I of the Constitution of BiH, for the highest level of human rights and freedoms but Annex VI, and even Annex VII, to the GFAP exclusively stipulate the methods and procedures for the protection of human rights.

Article 1 of the Agreement on Human Rights provides: "The Parties-Signatories (the Republic of BiH, the Federation of BiH and the Republika Srpska) shall secure to all persons within their jurisdiction the highest level of internationally recognized rights and fundamental freedoms including the rights and freedoms provided in the European Convention on Protection of Human Rights and Fundamental Freedoms and Protocols thereto and in the other international agreements listed in the Appendix to this Annex". In this respect, the Commission on Human Rights was established at the level of BiH and it consists of the Human Rights Chamber and the Office of the Ombudsman. The decisions of this Commission or the Human Rights Chamber as well as the Commission under Annex VII are final and binding. It is also an indisputable fact that, in accordance with the election results implemented based on the Agreement on Elections and Annex III to the GFAP, other minority peoples, Bosniacs, and Croats participate in the political and other authorities of the Republika Srpska in proportion to their election results. Thus, for example, the Law on Ombudsman of the Republika Srpska explicitly stipulates that the Office of the Ombudsman shall consist of one Serb, one Croat and one Bosniac, delegates of the People's Assembly of the Republika Srpska shall have the same rights and they take part in the work of the People's Assembly of the Republika Srpska, Deputy Speaker of the People's Assembly of the Republika Srpska shall be a Bosniac. Other peoples of the Republika Srpska, based on the same principle, participate in the work of the local authorities of the Republika Srpska and the election results, according to the PEC Rules and Regulations, are fully implemented.

By analogy, the Court arrived at the wrong conclusion that such constitutional provisions of the Constitution of the Republika Srpska could be discriminatory and could deprive refugees and displaced persons of the rights to return and to participate in authorities. This Court should fully reject this request as ill-founded.

e) <u>Method of the presentation of evidence during the course of the proceedings</u>

When deciding this case, the Court made use of statistical and other data to establish facts. In this context it used the UNHCR estimates on the 1991 and 1997 censuses. At the session of the Court held in Banja Luka on 23 January 1999, the Court with a 5:4 vote decided that this evidence should not be presented and that it had no relevance, considering that these issues are clearly legal issues aimed at answering the question whether some of the provisions of the Entity Constitutions are harmonized with the Constitution of BiH in formal legal terms. However, at the session held on 30 June and 1 July 2000, the Court with a 5:4 vote altered its previous conclusion, taking the position that that the Court should deal with facts. Nevertheless, there is no doubt that the establishment of the facts absolutely led to the wrong conclusion, which was contrary to the principles which define the legal position of the Constitutional Court as the guardian of this Constitution. Item 87, *inter alia*, stipulates: "as it can be seen from these figures, the ethnic composition of population in the territory of the Republika Srpska has dramatically changed since 1991. Although the Serb population, in statistical terms, had small absolute majority in 1991…."

Hence, the final report on the decision proceeds from the fact that nothing has happened in these areas since 1991, as if there was no long bloody conflict between the former constituent peoples and the dissolution of the former Republic of BiH. This conflict resulted in the signing of the Dayton

peace agreements that would recognize the status of this former Yugoslav republic, now with the changed name of Bosnia and Herzegovina and recognized only as a subject of international law but with modified internal structure consisting of two Entities, the Republika Srpska and the Federation of BiH. In other words, it follows that the Republika Srpska existed in 1991, which is not correct.

f) Decision-making process

We cannot disregard the fact that this Decision was adopted in a manner that the Judges from amongst Bosniacs and foreign Judges voted *for* the Decision and that the Judges from amongst Serbs and Croats voted *against* it.

We cannot also disregard the fact, which as a judge (although reluctantly) I must mention, that one of the three Judges and the Judge Rapporteur, Prof. Dr. Joseph Marko, a Venice Commission member who participated in its work, gave a positive opinion on the harmonization of the Constitutions of the Entities with the Constitution of BiH. The Commission in Strasbourg on 27 June 2000 upon the request of the then High Representative, Mr. Carl Bildt, presented this opinion. The following persons presented this opinion:

Joseph Marko (Austria)
Jean Claude Scholsem (Belgium)
Jacques Rober (France)
Sergin Bartole (Italy)
Jan Helgesen (Norway)
Andreas Auer (Switzerland)
Ergun Ozbudun (Turkey)

On 24 July 1996, this opinion was forwarded through the Office of the High Representative to Mr. Alija Izetbegović, the then Chair of the BiH Presidency; Mr. Mariofil Ljubić, Chair of the Constituent Assembly of the Federation and to Mr. Momčilo Krajišnik, Speaker of the People's Assembly of the Republika Srpska.

As a judge who participated in these proceedings, I sincerely hoped that Judge Joseph Marko would exempt himself from decision-making in this case since his opinion was given in the work of the Venice Commission and his proposal of the Decision on constitutionality of peoples are diametrically opposed to one another. I started from the fact that he could not take the position again in his capacity of a judge who has already presented his opinion relating to this issue. There is no doubt that this questions his objectivity in the work on this case and in any case, according to the Rules of Procedure and positive legislation, it represents a valid reason for his exemption from this case. Here, I do not want to mention the manner of voting on the request for exemption but I must say that the judges whose exemption was requested also were deciding on that exemption, which could be seen from the Minutes of the Court's session when the decision on this request was adopted.

According to the Rules of Procedure of the Court, decisions are adopted by the majority of votes and this procedure is beyond dispute, but we cannot ignore the fact that the representatives of only one people (namely Bosniac) took part in the adoption of the Decision out of three peoples whose constituent status is requested, while the Judges from amongst Serbs and Croats voted against this Decision. For these reasons it is not clear why the final text of this Decision under Item 144, paragraph 2 includes the following text: "This Decision was adopted by the Constitutional Court in the following composition: Prof. Dr. Kasim Begić, President of the Court, and Judges: Dr. Hans

Danelius, Prof. Dr. Louis Favoreu, Prof. Dr. Joseph Marko, Mag. iur. Zvonko Miljko, Azra Omeragić, Prof. Dr. Vitomir Popović, Prof. Dr. Snježana Savić and Mirko Zovko" when it does not reflect the facts. The Decision, in accordance with the Court's Rules of Procedure and the case law, must indicate those Judges who voted in favour and those who voted against. In this way, an attempt was made to deceive the public and create a wrong image on the adoption of this Decision so as to imply that all Judges of the Court voted in favour of this Decision.

The facts that under all legal rules Judge Joseph Marco should have been excused in this case due to his participation in the work of the Venice Commission related to the same legal issue, that Judge Hans Danelius dissented his opinion on the harmonization and did not accept the Preamble of the Constitution of BiH as binding in the normative sense, as well as the huge pressure by the media in the Federation of BiH prior to and during each session of the Court at which this Decision was discussed, more than clearly shows that the Decision had primarily a political and not a legal character.

There is no doubt that this Decision, in the manner stated in the final text, severely violated the provisions of the Constitution of BiH and the Dayton Agreement as a whole.

Having in mind the above-mentioned, I am of the opinion that the Court only could have and should have rejected the request of the applicant, Mr. Alija Izetbegović, as entirely ill-founded.

Method of the Decision's enforcement

Article 58 of the Rules of Procedure of the Constitutional Court defines: In adopting a decision, the Court decides on its legal effect (*ex tunc*, *ex nunc*).

A decision that identifies an inconsistency as referred to in Article VI/3 (a) and (c) may set the deadline to the request's applicant for harmonization, which cannot extend a three-month period.

If the identified inconsistency has not been removed within the prescribed time period, the Court shall adopt a decision and find that the inconsistent provision shall cease to be in effect.

The inconsistent provisions shall cease to be in effect on the day of publishing the Court's decision referred to in the previous paragraph in the "Official Gazette of BiH".

However, by its Decision, the Court failed, as it is a customary practice in this kind of cases, to set a deadline for bringing the Entity Constitutions into conformity with the Constitution of BiH. It should have applied Article 59, paragraph 4 of the Rules of Procedure only after a failure to act within the envisaged period.

CONCLUSION

1. Given the aforesaid, I think that this Decision of the Constitutional Court was not adopted in accordance with the Constitution of BiH and the Rules of Procedure of the Constitutional Court of BiH, and that it violates the provisions of this Constitution and the entire Dayton Agreement in the rudest possible way.

2. By acting in this manner, the Constitutional Court of BiH transformed its constitutional role of "the guardian of the Constitution" into a legislative body, and even the framer of the Constitution, which under my sincere judgment might cause incomprehensible consequences both to the Court,

the Dayton Agreement and Bosnia and Herzegovina – that is, its Entities: the Republika Srpska and the Federation of BiH.

3. The only possible decision that the Court should have adopted was to reject the applicant's request as ill-founded.

In the remaining part I fully support the dissenting opinions of the Judges of this Court: Snežana Savić, Zvonko Miljko, and Mirko Zovko, as well as that of Judge Hans Danelius in the part in which he did not consider the Preamble of the Constitution of BiH as an integral part of the Constitution in the normative binding sense.

This opinion of mine shall be valid in regard to the challenged provision of the Constitution of the Federation of BiH.

Prof. Dr. Vitomir Popović
Judge
of the Constitutional Court of Bosnia and Herzegovina

ANNEX
Dissenting Opinion of Judge Mirko Zovko
On the Partial Decision of the Constitutional Court of Bosnia and Herzegovina, No. 5/98 of 1 July 2000

Pursuant to Article 36, paragraph 2 of Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, I hereby submit my Separate Opinion.

This is the third Partial Decision on the stated case.

However, in the opinion of the BiH public, this is the most important part of the Decision, as will become evident upon further elaboration.

This decision was a solution to the challenged issue whether all three constituent peoples in BiH, Bosniacs, Serbs and Croats, are constituent in the ENTIRE TERRITORY OF BIH, i.e. in both Entities, the Federation of BiH and the Republika Srpska, OR NOT, i.e. that until now Bosniacs and Croats have been constituent in the Federation of BiH, and Serbs were constituent in the Republika Srpska.

This challenged issue was resolved as pronounced in the quoted Partial Decision, in such a way whereby five Judges voted IN FAVOUR of the application, while four Judges, I being one of them, voted AGAINST.

This decision was adopted in accordance with the Rules of Procedure of the Constitutional Court of BiH by a majority vote of all judges.

In relation to the procedural, primarily "formal", Decision, I have no objections.

It is noticeable that I emphasized the word "formal". I will elaborate this in further text.

By elaborating my Separate Opinion, I have considered ways of presenting the reasons for my legal position, which is an obligation of a Judge of the Constitutional Court, in such a way as to avoid thoughts and explanations of EVENTS related to this case. In other words, I considered ways to move within the limits of SELF-RESTRAINT of a Constitutional Court Judge.

However, even within the limits of self-restraint, I cannot avoid speaking of the different pressures and most serious insults which grew into most grave threats, not only to me but also to my colleagues, but which have primarily affected and still do, as they continue to occur, the independence of the Constitutional Court of BiH.

When the application was first filed, a campaign IN FAVOUR of honouring the application regarding the constituent status began its course in the Sarajevo-based media.

In this campaign, particularly prominent were non-governmental organisations headed by the SGV. These organisations lobbied everywhere, starting from ambassadors of large states to the former and current High Representative.

This is their right and for as long as it does not exceed the limits of what may be affecting the independence of this Court, I do have an understanding.

This was joined by a number of journalists from different public media.

This campaign was intensified prior to each session and each public hearing.

In this campaign, NOBODY EVER ONCE tried to publish, analyse or explain the legal aspects of this case.

Only the political aspect was presented and even that in a way as seen by those advocating IN FAVOUR.

I cannot believe that some journalists who dealt with this issue in particular did not know and did not try to explain the legal aspects. If they did know, then I must say that they did not dare expose it. Such a campaign was totally one-sided and to an ordinary citizen in the territory of this region it created an image of this case in a politically programmed way. One may say: THOSE IN FAVOUR are friends of BiH and those AGAINST are its enemies. I do not say this unfoundedly as I experienced it, unfortunately even from lawyers for whom I cannot say with certainty whether they had seen the Constitution, and I mean the Constitution of BiH.

It would be far too extensive to analyse all the publications which were one-sided and which, in my opinion, represented "single-mindedness".

Approximately ten days prior to the adoption of this Decision, non-governmental organisations organised a gathering attended by representatives and experts in this case who were IN FAVOUR. This gathering was given prominence in newspapers, TV and radio.

At this gathering, the President of a non-governmental organisation, a wartime co-opted member of the Presidency from the Croat people, stated publicly that the Judges of the Constitutional Court who failed to adopt a positive decision would stand trial (as that was the only possible decision) and not only that; he also "promised that they would stand trial". However, here he was referring only to Judges representing the Croat and the Serb people. This was the voice of a man who holds a doctorate and who has changed a number of parties. I once responded in the media, calling this statement "Bolshevik", and said that I was not surprised as the gentleman had held senior "communist functions" prior to the war.

This offensive-like campaign by the above had been reaching its culmination before the decision was adopted.

However, on 1 July 2000 the Decision was passed IN FAVOUR, and I thought that I and the colleagues who voted against it would be left at peace.

The Decision adopted was "extremely incautiously" but correctly predicted by the applicant in late 1998 in an interview given to "Avaz" daily newspapers, when he said: "We need five votes for the Decision, three foreign Judges will probably vote for us, which means that in the worst case we will have five votes".

In January this year, precisely on 14 January 2000, in "AS" weekly, there was a bold type headline "*Judges Angered Izetbegović*".

While discussing improvements of the work of the Constitutional Court and allocations of more funds for the coming year, the text said that Mr. Izetbegović, angry at the (lack of) work of this institution, snapped at those who proposed it - I quote: "Those people do nothing, they just cackle. And hens like that do not lay eggs".

Hence, the first statement is "extremely incautious" and the second one is "extremely insulting".

And then, on 1 July 2000, "hens did lay an egg, a GOLDEN one", since the request was granted.

After that, I/we personally expected that I/we would be left at peace, but NO.

On 7 July 2000, on an entire editorial page, a weekly paper, "BH Dani", printed its editor's comment titled "The Seventh Day" and, while glorifying other participants to the proceedings, ruthlessly insulted me and Dr. Zvonko Miljko in particular. Judges from the Republika Srpska were "signed off" by the editor, saying that he was not even surprised by their vote, but for the two of us he said that "I cannot free my mind from the names of Judges representing the Croat people" (presumably in BiH) which should be remembered well: so, MIRKO ZOVKO, ZVONKO MILJKO! History of crime and dishonesty against this country is familiar with examples of greater criminals and shameless men, but names of Zovko and Miljko deserve a special place. They symbolise the bare farcical end to criminal politics of the "Protection of the Interests of the Croat People in BiH" of the Croatian leader until recently, implemented with the slyness of a lieutenant of the Yugoslav People's Army, by the grand traitor in the, oh, sorrow, Presidency of BiH, Ante Jelavić".

In that same paper, on four pages with the headline "Bosnia Returns to Itself", another journalist (just like his editor) used the worst lies and constructions to attack and insult "relentlessly" primarily the two of us, Judges from the Croat people. Others were heroes worthy of medals.

Is the quoted not horrific, which is how I feel, since of the three Judges in question, I have been living in Sarajevo the longest, namely 48 years.

This relentless campaign continues to persist.

All this speaks of an incredible attack against the independence of the Court.

We shall mention one, "Sarajevo is not entire Bosnia and Herzegovina", and people in Bosnia and Herzegovina do not all have the same opinion as some listed above.
That is why I will ask, first of all, people of good will, colleagues, to try and think objectively about this Separate Opinion and then, if they can, to think about me as a Judge. As I write this and plead, I feel sad and resigned since an entire propaganda mechanism tried to influence my consciousness in a most ruthless way by using all means, including threats against my freedom and the integrity of a judge, attacking at the same time my other colleagues (such as Judge Zvonko Miljko).

So, when discussing this later, I will ask the readers to eliminate "thinking under the influence of propaganda" and to think as free individuals, of their own free will, and not as programmed.

I would certainly be happy if the High Representative would take a position on this.

Let me move to a rationally disputed issue, where my position is clear.

Ever since the adoption of the Decision, I have never publicly implied who voted how and, in that part, I hold it against my colleagues from the Republika Srpska that they did so the very day after the voting. This objection is not particularly relevant, as information has been leaking from the Court for some time, with the over-used phrase "we learnt it from sources close to the Court".

My position is that the decision of the Court on the issue of constituent status is a most blatant REVISION of the General Framework Agreement for Peace in Bosnia and Herzegovina, the "Dayton Peace Agreement". First of all, in relation to Annex IV of the said Agreement titled the Constitution (referring to the Constitution of BiH), which provides a thorough revision of the organisation of government and the judiciary in the Entities but, "unfortunately", puts into question the Constitution of BiH itself.

A revision of the organisation of government and the judiciary in the Entities would not be a revision if the Constitutions of the Entities regarding the disputed matter were really not in conformity with the Constitution of BiH.

However, it will be evident from the elaboration of my position that by adopting the said decision WE BROUGHT our own Constitution of BiH INTO NON-CONFORMITY.

Namely, if we revised the Constitutions of the Entities and the organisation of the government and the judiciary in them, by deciding on the basis of Article XII, paragraph 2 of the Constitution of BiH, WE COULD NOT REVISE the organisation of the government and the other institutions at the level of the State of BiH, since pursuant to the Constitution this can only be done by the Parliamentary Assembly of BiH in an amendment procedure in accordance with the provision of Article X, paragraph 1 of the Constitution of BiH.

Therefore, the Constitutional Court and its Judges are merely guardians of the Constitution as it is and NOT constitutional legislators.

Thus, constitution legislators are only the representatives of the people (constitutional or any other) who can, in a parliamentary state, alter the Constitution of BiH at the level of the Parliament through the said amendment procedure.

On the contrary, by resolving and having resolved this case in a way that the Decision before the Constitutional Court was adopted, an issue of the most sensitive nature was raised in relation to the peoples of BiH, those who feel it best and approach it differently, and that is why this Decision may have far-reaching, though in my opinion, unfortunately negative consequences which I shall mention in further elaboration.

In any event, it is obvious that our Decision "overlooked" the BiH Parliament, which could have resolved this issue only by consensus.

I have presented my position so far.

However, a judge's position is a formulation of his final opinion, and in order to make it authoritative, one needs to indicate decisive reasons. I shall give those reasons with no intention to elaborate them in a "highly theoretical-academic vocabulary". Therefore, I will try to express myself in simple terms, understandable to any reasonably well-educated citizen of BiH. This in particular since I know that my colleagues who have also given their Separate Opinions will also have a theoretical approach to their reasons.

Speaking about it at the session when this Decision was adopted after a number of sessions and public hearings, one Judge said that this was "the most complicated case" but he also said that this was "the case of all cases".

I agreed with the latter opinion, which is evident from my elaboration so far. However, I do not agree with the former one, as I said that this was »a simple case« and that it could have been resolved immediately with a partial decision, provided we had followed the maxim *de scribere de mundo* - what is written, exists. Therefore, there are doubtful provisions of the Entity Constitutions and the Constitution of BiH regarding supremacy (primacy) pursuant to Article XII, paragraph 2 of the Constitution of BiH.

If I were right, this case would have been simple and, in my opinion, should have been resolved with a consensus of all the Judges in a uniform way, and with no intention to be pretentious, this would be as follows:

1. In relation to the Constitution of the Federation of BiH, Article I.1 (1), as replaced by Amendment III, that it is IN CONFORMITY with the Constitution of BiH.

Therefore, the applicant's request should have been DISMISSED.

2. In relation to the Constitution of the Republika Srpska, I voted against since the request was already voted as accepted by the Decision, and my opinion is (and that was my proposal) that the challenged provisions of the Constitution of the Republika Srpska are in conformity with the Constitution of BiH save one which speaks of "sovereignty".

Here, the reader of this Separate Opinion should study carefully the terminological and content differences between the provisions of both Constitutions, since there are considerable differences which I do not wish to comment here, as the wording of the said provisions is given in the decision of the Court.

In order to explain the deciding reasons for my final position, as a *questio iuris* issue, I should say that I as a Judge – a guardian of the Constitution – hold that the most important issue is the interpretation of the Constitution of BiH itself.

I consider that for this interpretation to be properly conducted one should, first of all, draw conclusions of what the legislator had in mind when adopting the Dayton Peace Agreement.

One could arrive at such a conclusion from the interpretation of the Constitution of BiH as Annex IV to the Agreement, as I shall expound later on.

However, as the claims of the parties to the proceedings, especially those of the applicant, initiated different approaches to this interpretation, my obligation was *ex legge* to give answers as a Judge. Therefore I will not elaborate my stand in relation to the Constitution of BiH only but rather more extensively.

I will present the reasons for my position in light of the events related to this constitutional dispute in three phases, with the following headings:

1. What preceded the adoption of the Dayton Peace Agreement and the Agreement?

2. What occurred from the adoption of the Dayton Peace Agreement until the institution of the proceedings on this constitutional issue?

3. Proceedings and decision-making on this constitutional issue

1. WHAT PRECEDED THE ADOPTION OF THE DAYTON PEACE AGREEMENT AND THE AGREEMENT

Since I stated that I wanted to "simplify" the case in order to bring it closer and make it more understandable for any citizen of BiH, I chose the methodology of interpretation of positive law in linguistic, logical and systematic sense.

This first phase that preceded the adoption of the Dayton Peace Agreement was characterised by a tragic war in BiH. As a judge, I avoid any political connotations in the sense of "who is to blame for the war".

The fact remains that the war underwent transformations and that in the spring of 1993 all three constituent peoples were at war ALL AGAINST ALL following a well-known definition *bellum omnium contra omnes*. Paramilitary states were also established in this war.

Of the three constituent peoples, two (the Bosniac and the Croat) were reconciled through the Washington Agreement and they established the Federation of BiH. Not only that they created it, they also adopted a Constitution.

According to that Constitution, the two peoples who had been at war in the territory of the Federation thus became constituent in the territory of the Federation of BiH, as they had been constituent before and they had the power to enact a Constitution.

It should be said here that the very word constitutionality is derived from the word *constitutio* – which means constitution, and we know that in terms of supremacy this is the highest legal act organising the foundations of the governmental and social system of a state.

However, to avoid any misunderstandings, a constitution does not determine its constituent peoples; on the contrary, constituent peoples as "constituent or constitutional" reflect the power of the people to enact a constitution and create a state.

This Constitution also organised the Federation of BiH into Cantons and Cantonal constitutions were adopted; according to these constitutions, Bosniacs and Croats remain the constituent peoples in the Federation of BiH.

The war continued and in the unrecognised Republika Srpska, which had been created by Serbs, they were the constituent people. It would have been "ridiculous and absurd", as it is well known, if Bosniacs and Croats had taken part in the creation of the Republika Srpska.

A series of negotiations followed, but specific ones were those that lead to the ultimate establishment of peace through the Dayton Peace Agreement.

Specific to this historical process is the "Agreement on the Basic Principles", first in Geneva on 8 September 1995 and later in New York on 26 September 1995. Most specific is the fact that the Republika Srpska took part in these talks.

Under Item 2.2, one of the principles agreed in Geneva reads: "Each of the Entities (the Federation of BiH and the Republika Srpska) will continue to exist in accordance with its current Constitution", with an obligation to reconcile their Constitutions with these principles.

Therefore, the agreed principle cannot be ignored in relation to the interpretation of the Constitution of BiH, i.e. in relation to the disputed issue. This in particular since the last sentence of the Constitution of BiH reads - I quote "RECALLING the Basic Principles agreed in Geneva on 8 September 8 1995 and in New York on 26 September 1995".

From this one may conclude that THERE WAS NEVER ANY mention of the fact that the structure of the Entities will be altered with the final peace agreement, in relation to the constituent status of the peoples.

This is also where the challenged part of the Preamble that the applicant based his request on is mentioned.

We shall see that in further text. The General Framework Agreement for Peace in Bosnia and Herzegovina, along with Annex IV, (Constitution of BiH) certainly and beyond doubt represents an international treaty known to constitutional law practice.

The Dayton Peace Agreement was adopted in Dayton, Ohio, USA, between 1 and 21 November 1995.

It is clear from the above that, through their representatives, states created in a historical moment of war did take part in the negotiations and the conclusion of the Peace Agreement. They also, *inter alia*, accepted the Constitution of BiH on behalf of their constituent peoples. This is evident in Annex II under Interim Provisions from the statements made on behalf of the Republic of Bosnia and Herzegovina, on behalf of the Federation of Bosnia and Herzegovina and on behalf of the Republika Srpska.

I will quote the statement on behalf of the Federation of BiH, which reads: "Federation of Bosnia and Herzegovina, on behalf of its constituent peoples and citizens, approves the Constitution of Bosnia and Herzegovina contained in Annex IV to the General Framework Agreement".

It is clear and well known that the constituent peoples in Bosnia and Herzegovina are Bosniacs and Croats. There are no indications as to any change in relation to the issue of constituent status vis-à-vis the Washington Agreement.

In the interpretation of the Dayton Peace Agreement, Annex IV in particular, it is evident that the denominations of the newly created Entities were preserved, namely the Federation of BiH and the Republika Srpska. Moreover, it is specific for the Federation of BiH that it preserved part of the name of the state of BiH, i.e. »BiH«.

It is also obvious that the Federation was founded through the powers of two constituent peoples, Bosniacs and Croats, as it is obvious who it was that established the Republika Srpska.

The Decision of the Court that I voted against would not have been a problem if the Dayton Agreement had established a "unitary state".

It is clear that this is not so, and I will therefore avoid theorizing from the viewpoint of theories of state and law.

It is manifest that the Federation was not established by Serbs and that the Republika Srpska was not established by Croats and Bosniacs.

But what remains UNCLEAR to me, after the Decision on constituent status of peoples on the entire territory of BiH, how can there still be an Entity named "Republika Srpska". Following our decision, it can only be called, for example, A Republic of Serbs, Bosniacs and Croats.

And would this not be a revision of the Dayton Agreement or even an "abolishment of the Entities". Be that as it may, it suffices to follow the comments of the media, non-governmental organisations and political parties, primarily those seated in Sarajevo, after the adoption of the Decision to know that they all think alike and conclude that this Decision will lead to the ABOLISHMENT OF THE ENTITIES. Among them, there are many who attack the Judges who voted against it, although their wish was probably fulfilled. I do not hold them to be naive and not to know that this would be a revision of the Dayton Agreement.

If so, then we have a proverb that says that "they are making plans without consulting the concerned party". Have we, with the above decision, assumed the powers of the people to alter the Constitution and revise our own Constitution. Time will tell have we brought it INTO CONTRADICTION or not.

It is my duty to safeguard the Constitution and to interpret it at the same time.

In order to disperse any doubts as to the Dayton Peace Agreement NOT ALTERING the issue of the constitutionality of peoples but rather that it remained the same, I include in my Separate Opinion the "Agreement on Implementation of the Federation of BiH", adopted in Dayton on 10 November 1995.

This protocol is beyond any doubt an integral part of the General Framework Agreement for Peace.

Item 1 of the General Principles reads – I quote: "Full implementation of the Federation of BiH is an important precondition for peace in BiH. Without a strong, fully functioning Federation, as one of the two constituent Entities of BiH, the Dayton close talks cannot result in a lasting peace solution. Twenty months following the adoption of the Constitution of the Federation, the process of strengthening the Federation and building confidence between ITS CONSTITUENT peoples has not yet yielded satisfactory results".

There follows a recommendation as to what the constituent peoples in the Federation should have done but had failed to so.

However, what is important is that THERE IS NO mention of a third constituent people in the Federation.

This Agreement is detailed and it was signed in the presence of international witnesses. This Agreement, Section II (Decisions) under a) Item 8, states: "Ministers, Deputy Ministers and staff of the Ministries must not perform duties in both Governments (referring to the Government of BiH). Ministries must be adequately staffed. Within one month from the date these legal proposals are adopted, relevant Ministers and their Deputies will appoint their staff anew. Composition of the staff MUST REFLECT THE COMPOSITION OF THE PEOPLE".

Again there is NO MENTION of a third people. Not only that, but there is a clear requirement that it "must reflect the composition of the people".

A corresponding action followed afterwards and the said Ministries do reflect the composition of the people, but in the way as provided for in the Dayton Agreement. Messrs. Alija Izetbegović and Krešimir Zubak signed this Agreement, with a closing statement that reads: "President of the Republic of Croatia supports the provisions of this Agreement and will assist in its full implementation".

This last quote is a sufficient illustration as to who are the constituent peoples in the Federation, for if Serbs were constituent as well, then somebody from their side should have also "support the provisions of this Agreement".

An integral part of this Protocol is the Annex to the Agreement on the Implementation of the Federation of Bosnia and Herzegovina, adopted in Dayton under the title "Agreed Principles on the Interim Statute of the City of Mostar".

Item 8 of this Statute lists the composition of the City Council, which was to manage six City Municipalities. Based on the principle of parity, the same number of seats was envisaged for Croats and Bosniacs, and one part for "Others".

The Decision of the Court I voted against violates this principle as well, but I do not mention this for the sake of this particular problem alone, but rather to indicate that analysed legal and factual materials demonstrate beyond any doubt that constituent peoples in the Federation of BiH are Bosniacs and Croats.

However, all that I have presented and substantiated indicates undoubtedly that the applicant before the Court, whose application was granted, knew quite well what he was signing and what the meaning of the Dayton Agreement was in relation to the constituent status of peoples.

This illustrates the fact that his application, which has been ruled upon, was his personal, REVISED POSITION. This is in short all vis-à-vis the heading "What preceded the adoption of the Dayton Peace Agreement and the Agreement".

TO SUM UP, I may conclude that this is "MORE THAN ENOUGH" as argumentation of the disputed issue and that it is sufficient for the interpretation of my personal position, as a lawyer and Judge of the Constitutional Court.

I may be even "impolite" and say that after the elaboration which I have presented and which is authentic, I should not continue elaborating the reasons for voting the way I did.

But as I said that I would present my arguments in three phases, I shall proceed with the second one:

2. WHAT OCCURRED FROM THE ADOPTION OF THE DAYTON PEACE AGREEMENT UNTIL THE INSTITUTION OF THE PROCEEDINGS ON THIS CONSTITUTIONAL ISSUE

The final Article of the Constitution, namely Article XII titled Entering into Force, Item 2, provides that essentially the Entities are obliged to conduct an amendment procedure and alter their Constitutions in order to ensure conformity with the Constitution of BiH, no later that three months from the date on which the Dayton Agreement enters into force.

For the sake of the lack of knowledge of the subject matter both by general public and some experts, I would like to mention here a gathering held by non-governmental organisations on 20 June 20 2000, attended by the applicant's counsel and experts and others, where only one decision was advocated and it was, with no dilemma, a positive one; that is, *in favour*.

It is also characteristic that the President of the Club of Bosniac Intellectuals stated explicitly that the "Constitutions have never been reconciled from Dayton until today".

I do not respond to that gentleman's assertion, I just give an example that most people, particularly those who follow the Sarajevo media, DO NOT EVEN KNOW that the Constitutions of both Entities were reconciled in 1996.

How would they know if the above mentioned professor did not know? In any event, the rule of manipulative propaganda is to avoid whatever may be damaging to the programmed propaganda.

Those who are interested will bear to read this.

Pursuant to provisions of Article XII, Item 2 of the Constitution of BiH, in both Parliaments, the Entities reconciled their Constitutions with the Constitution of BiH.

Whether they reconciled them well or not is another question.

The Constitution of the Federation of BiH was reconciled on the basis of a proposal by the Constitutional-Legislative Commission, presented to the Parliament by Prof. Dr. Kasim Begić on 5 June 1996. The proposal contained 36 Amendments.

Regarding the challenged issue of constitutionality of the peoples in the Federation, the proposal was that Bosniacs and Croats were constituent peoples in the Federation of BiH.

Results of the vote were as follows:

ALL *in favour*, none abstained, NO ONE *against*.

Should it not be considered what this means. Absolutely yes, if the truth is seen benevolently.

The truth is that all voted *in favour*; the truth is that most of the members of the Parliament were from the two leading parties, SDA and HDZ; the truth is that there were Serbs and members of other parties among the members of the Parliament and that they all voted UNANIMOUSLY that the constituent peoples of the Federation were Bosniacs and Croats.

Again, NO MENTION of a third constituent people.

However, further logical deduction inevitably leads to the following conclusions:

a) That this truth was logical since there was no doubt in the interpretation of the Dayton Peace Agreement which had been in place approximately six months earlier. Therefore, the MEMORY WAS FRESH AND FOUNDED.

b) That the applicant knew all this quite well since members of his party, SDA, of which he is the president and who were the majority in the Parliament, all voted *in favour* unanimously.

c) There are further truths and those are that most of the representatives and expert counsel in this case took part in the interpretation of the Dayton Agreement in different ways: as counsels, experts or at other public forums at the time, and that at that time their OPINION was DIAMETRICALLY OPPOSED to the one they presented at public hearings before this Court.

Since there cannot be TWO TRUTHS about one single fact, the question arises as to what is the real truth for there can only be one – be it the first one, fresh in time and memory, or the latter one, accepted in this Court’s Decision.

I would like to note here that some of the counsel and experts who CHANGED THEIR OPINION had also been experts in Dayton and in the applicant's team. I should not and wish not to offend anyone, but in the interest of truth I must define the conduct of the above mentioned individuals as a classic revision of personal, political and legal positions.

These are CONVERTS. This notion is recognised in politics and it bears a deep content. However, I dislike it in lawyers. Both I and my colleagues who voted against this Decision are being mercilessly attacked, insulted and threatened. They themselves are a disgrace.

I will also say this: converts do not like consistent people, as they remind them of their own conscience. I will also say and, unfortunately, later illustrate that there have been converts in the Court as well. Certain things need to be uncovered in order to protect the integrity of the Court and my own.

Once the first elaborated heading on the interpretation of the Dayton agreement is seen as a logical whole, does all the above not indicate what the real truth is. In 1996, no one questioned the unanimous decision of the Parliament since it was BEYOND QUESTIONING.

That is why a question arises as to what had changed so that it was later possible »for one truth to be replaced by another«. For me, this is impossible.

The above are positions and actions of official participants to the events related to the obligation of reconciling the Entity Constitutions, primarily in the Federation of BiH, with the Constitution of BiH in relation to *ius cogens* provision of Article XII, paragraph 2 of the Constitution of BiH.

These events were CAREFULLY monitored by the international community, in particular through the Office of the High Representative, at the time Mr. Carl Bildt.

And in relation to this very issue of the CONSTITUTIONALITY OF THE PEOPLES in BiH, THE INTERNATIONAL COMMUNITY TOOK A POSITION. At the time, the position was UNDISPUTED and it was as follows: BOSNIACS AND CROATS ARE CONSTITUENT in the Federation of BiH and SERBS are constituent in the Republika Srpska.

The above is evident from the following:

a) On 24 July 24 1996, Office of the High Representative addressed a letter to Messrs. Alija Izetbegović, President of BiH, Krešimir Zubak, Mariofil Ljubić, Speaker of the Constitutive Assembly of the Federation, and Momčilo Krajišnik, Speaker of the Assembly of the Republika Srpska.

The letter read - I quote: “I have the pleasure of forwarding to you the opinion of the Venice Working Group in reference to the compatibility of the Constitutions of the Federation of Bosnia and Herzegovina and the Republika Srpska with the Constitution of Bosnia and Herzegovina. Translation of the opinion will soon follow.

Although the Commission confirms that both the Federation and the Republika Srpska have invested considerable efforts to bring their Constitutions into conformity with the Dayton Agreement, detailed analyses of these provisions demonstrate that such conformity has not yet been achieved.

Accordingly, I expect the legislature of both Entities to adopt the next set of Amendments to their Constitutions before elections in September. I would like to be informed no later than 12 August on the steps you intend to take in light of the report by the Council of Europe.

In order to speed up the process of adoption of the necessary amendments, I have suggested to the Council of Europe that members of the Working Group of the Venice Commission should come to Bosnia and Herzegovina and assist both Entities in drafting their amendments.

Sincerely,

Carl Bildt"

Therefore, the High Representative admitted the fact that considerable efforts had been made in the process of reconciling the Constitutions, but that certain provisions of the Entity Constitutions had not yet been reconciled.

It is clear from the above that the "opinion of the Venice Working Group" was binding. Also, members of the Venice Commission Working Group were to come to BiH to assist in finalising the amendment procedure on the said reconciliation, and that they were to submit the said opinion once the translation had been completed.

b) I hereby quote in full the opinion of the European Commission for Democracy through Law called "The Venice Commission« in the introductory part:
"Strasbourg, 5 July 1996

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
OPINION ON COMPATIBILITY OF CONSTITUTIONS OF THE FEDERATION OF BOSNIA AND HERZEGOVINA AND THE REPUBLIKA SRPSKA WITH THE CONSTITUTION OF BOSNIA AND HERZEGOVINA

Approved by the Working Group on the basis of contributions made by
Mr. Joseph MARKO (Austria)
Mr. Jean-Claude SCHOLSEN (Belgium)
Mr. Jacques ROBERT (France)
Mr. Sergin BAROTLE (Italy)
Mr. Jan HELGESEN (Norway)
Mr. Andreas AUER (Switzerland)
Mr. Ergun OZBUDUN (Turkey)

And following a discussion at the meeting of 27 July 1996 held with representatives of the Office of the High Representative, Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina".

Furthermore, the introductory part of the report shows what duties were placed before the Commission by the High Representative, in order to say "the following particular documents were used as basis for the opinion:
- The Dayton Accords, particularly Annex IV containing the Constitution of BiH,
- Constitution of the Federation of BiH as part of the Washington Agreements (Document CDL(94)28,
- Amendments to the Constitution of the Federation of BiH, adopted on 5 June 1996 (CDL(96)50) as well as some amendments annexed to the document CDL(96)50 over which no agreement has yet been reached,
- Constitution of the RS, as amended (document CDL(96)48)".

The introduction quoted above, which I have not quoted in full for that would have been redundant, makes it clear who were the members of the Working Group, that they had a meeting on 27 June 1996 with representatives of the Office of the High Representative, Bosnia and Herzegovina and the Federation of BiH, and that this opinion was binding etc.

It ensues from the composition of the Working Group that it was comprised of seven members and that it was headed by Mr. Joseph Marko from Austria, also a Judge of the Constitutional Court and the Judge Rapporteur in this case.

I wish to note that I learnt this "by accident" in the spring 1999 from a newspaper headline.

As I was holding the office of the President of the Court at the time, it was my duty to inform the Court of this, more so since this was followed by a request from the People's Assembly of the Republika Srpska as a party to the proceedings, that Judge Joseph Marko be excluded from the proceedings.

However, I shall return to this later, as I need first to elaborate the position of the Venice Commission.

Following the introduction, the Venice Commission continues with the following heading: MAIN OBJECTIONS and provides in a very analytical, systematic and logical way a synthesis and crucial answers to the following questions:
1) In the amendment procedure that had already taken place in the Parliament, what was BROUGHT INTO CONCURRENCE with the Constitution of BiH CORRECTLY, and
2) WHAT WAS NOT?

What I found interesting, and other Judges certainly should have also (although I do not know if the public will be interested AS WELL), is what is the position regarding the issue of the CONSTITUTIONALITY OF THE PEOPLES IN BiH.

This position is clear and undisputed and, as I stated in the introduction to this analysis and I repeat once again, resolved in such a way that the constituent peoples in the Federation of BiH are BOSNIACS AND CROATS, and SERBS in the Republika Srpska.

This is why: Before I move to Item I/1, as modified by Amendment III, the report said that the Constitution of BiH and the Constitution of the Federation of BiH as part of the Washington Agreement are "more of an international law than a constitutional text" and that in its nature it is "more contractual than normative". That the Constitution of BiH, without explicitly noting it, envisages a federal state for it defines two Entities as constituent parts of BiH etc. The sub-heading, which reads as follows: Item I/1, having been modified by Amendment III, *inter alia*, provides that an allusion to Bosniacs and Croats as "constituent peoples in community with Others" is realistic and IS NOT IN CONTRAVENTION to the Dayton Agreement.

It then proceeds to say that this should be observed from a historical point of view in light of the 1974 Constitution, and even the 1910 Constitution, "that it is quite correct that the FEDERATION IS DEFINED AS THE ENTITY OF BOSNIACS AND CROATS AND THE REPUBLIKA SRPSKA A NATION STATE OF THE SERB PEOPLE".

With this, I would like to end my elaboration and say that my position as a Judge is absolutely IDENTICAL to: the position taken by the international community, as well as the position UNANIMOUSLY ADOPTED by the Parliaments of the Federation of BiH and the Republika Srpska in an earlier amendment procedure.

It is obvious that the Venice Commission conducted an analysis of the Dayton Agreement and the procedure and decisions on the amendment procedure in reconciling the Entities' Constitutions with the Constitution of BiH and the Constitution of BiH itself.

There is indeed no dilemma here that I took the right position that the Decision of this Court is a "revision of the Dayton Agreement" in a most evident and most delicate form, since it deals with the most sensitive issue of constitutionality of peoples of BiH, and it is in contravention to the position of the international community.

This is also a revision of the position of the international community. That is why I await the opinion of the international community once this Decision is published along with the Separate Opinions attached to it in the Official Gazette, since the media have reported that the High Representative would take a position on the issue once the Decision and Separate Opinions have been published.

I also expect that the media, particularly those based in Sarajevo, and other people of good will, will either make statements or "think carefully" about this judicial Decision.

The second phase I would like to elaborate covers a long period of time, as its »evolution« commenced with the institution of the proceedings, with a notable activity of a non-governmental organisation, namely the SGV.

In a public address (the only one since my function as the President of the Court ended), I was forced to respond to the insults and threats that were directed particularly towards the Judges of non-Bosniac nationality, and I said – and I maintain this position – that I support and approve any political struggle of any organisation in a multi-parliament system, but in a way that does not go beyond the limits of good will.

Most of all, a struggle must be in compliance with the constitutional system of BiH.
By this I wish to say that I fully respect the ideas of the SGV, later joined by other non-governmental organisations as well as numerous political parties.

SGV held a round table titled "Declaration on the Human Right to Political and National Equality" on 14 June 1997 in Vogošća. A number of distinguished citizens took part in this meeting, and when I read the proceedings published in November 1997 in Sarajevo, I noted that Mr. MICHAEL STEINER gave a speech on the last page.

Mr. Steiner, who was an assistant to the High Representative at the time and who is currently an advisor to the Chancellor Schroeder in FR Germany, needs no special introduction. In his address, Mr. Steiner welcomed the ideas of the Declaration, but he said: "According to its Constitution, this State is organised on the principle of consensus. After the war, this is probably the only way to organise a common state".

I further quote the crucial part of Mr. Steiner's presentation, as follows:

"An integral part of Dayton is what was agreed upon, and I believe that this was in September 1995. And it was quite clear then that BiH would comprise of the Federation and the Republika Srpska. I must say that the vision at the time was that the Republika Srpska was seen as an Entity that would organise the Serbs, and the Federation would organise Bosniacs and Croats. Strategically, it was a high price for peace. That was a kind of middle step, which led to Dayton later. We have just left

Sintra behind us. In my opinion, the most important part of Sintra is a short sentence at the very beginning of the Declaration, mentioning two multi-ethnic Entities as components of Bosnia and Herzegovina. This Declaration, in reality, OFFERS SOMETHING THAT IS A CONSTITUTIONAL NUCLEAR BOMB, for if we look at the development of events and if the Entity Constitutions were brought into harmony with the Constitution of Bosnia and Herzegovina and if there is mention of three peoples plus Others, I do not see WHY SHOULD YOU CALL IT AN ENTITY, EVEN THE REPUBLIKA SRPSKA".

I am convinced that Mr. Steiner was undoubtedly very familiar with the Dayton Agreement and thus the Constitution of BiH etc., so that his words have a particular RELEVANCE.

Not only that I am convinced of the truthfulness of Mr. Steiner's thinking, I am also CONCERNED by such thinking, particularly the idea that WHAT IS OFFERED IS A CONSTITUTIONAL NUCLEAR BOMB.

I wonder what our Decision represents. I hope that Mr. Steiner will be proven wrong, but dilemmas remain. If this significant statement by such an eminent individual is true, which I do not doubt, and when I establish logical links with everything I have discussed here, I conclude again that my vote was founded and that the Decision does represent, as repeated so many times, a REVISION of the Dayton Agreement.

I would thus like to end my presentation on the "second phase" on events in the time period from the Dayton Peace Agreement to the institution of proceedings on this constitutional issue.

The third phase is titled:

3. PROCEEDINGS AND DECISION-MAKING UPON THE CONSTITUTIONAL DISPUTE INSTITUTED

In relation to the proceedings, I will generally say that, as stated in the Decision, it was initiated in February 1998, regarding this Partial Decision (the third one in this case), and it was ended on 1 July this year.

Pursuant to Article VI Item 3 (a) taken in conjunction with Article XII Item 2 of the Constitution of BiH, the applicant (Chair of the BiH Presidency) had the right of action to institute proceedings.

The proceedings progressed through a number of sessions and three public hearings of the Court, as provided in the Decision.

At the end of this presentation I will produce certain objections that I believe should have been elaborated in the Decision, precisely because of the principle of contradiction of proceedings in relation to the parties to it, and which should not have been evaded.

This means that I will *a priori* speak of my substantive-legal view and the reasons for my position on the merits of the case that resulted in my already known vote.

As this Separate Opinion has already been extensive, but so is the nature of this matter, one may note that I do not present the claims of the parties to the proceedings since they were presented in the Decision, but rather my position allows one to conclude which claims I hold to be founded or not.

The applicant's claim certainly "tried" to prove, in relation to the issue pertaining to Articles 1 of both Constitutions, that what arises from the Constitution of BiH is that the Entities' Constitutions are not in concurrence with the Constitution of BiH in this part.

The applicant founded his claim primarily on the last line of the Preamble to the Constitution and, through his actions at hearings, he was trying to use »events taking place in the field« to prove discrimination and substantiate his claim by using statistical indicators.

I have no intention of providing a detailed elaboration of the claims and counter-claims of the parties to the proceedings, as my main task is to give decisive reasons and indicate that my vote in this matter was founded through the interpretation of the Constitution of BiH and certainly with the assistance of other decisive arguments. I will now move to specific analysis of the Constitution of BiH.

I would like to note here that, for the sake of the CHRONOLOY of the events as they occurred, at the very first phase of elaboration of the key reasons I indicated the clear and undisputed sense of the Dayton Agreement, supported by factual-legal arguments. Therefore, this is an explicit citation of the arguments indicating what is the CORRECT INTEPRETATION of the Dayton Agreement and thus of Annex IV – Constitution of BiH in relation to the issue of constitutionality of peoples. Moreover, in that part I said that I could have finished with an elaboration which indicates that my position is founded.

The second phase demonstrated yet again the CORRECTNESS of my interpretation. This is so for IT WAS BEYOND DOUBT, as the Parliament of the Federation and the People's Assembly of the Republika Srpska had already resolved this issue. I do not know precisely if the Parliament of the Republika Srpska resolved this issue unanimously or not. But I do know that on 5 June 1996, at the Federation Parliament, this issue was resolved UNANIMOUSLY. Most significantly, this issue of the constitutionality WAS RESOLVED by the international community in the method that I have already elaborated upon.

I could have certainly ended there since I have supplied plenty of crucial reasons for my position. I will nevertheless provide an analysis of the Constitution of BiH, which could ITSELF have provided all the answers and key reasons that would again found the correctness of my vote.

In the methodology of the elaboration of my Separate Opinion, I could have followed a reverse order, i.e. I could have started from the Constitution, which would have been enough, and then elaborated the two phases.

The Constitution of BiH bears the title: the Constitution of Bosnia and Herzegovina. The title is followed by a Preamble, and the normative part of the Constitution follows further. The Preamble has nine indented lines. The said lines start with words: "pursuant to, committed to, convinced that, desiring to, guided by, determined to, firm, inspired by and recalling".

I would like to suggest to the reader of this Separate Opinion to read this Preamble and the said lines carefully.

One reading will be sufficient to see that the Preamble itself has a "political-declarative" character.

In short, if it has a political-declarative character, it does not have a normative one.

The question whether the Preamble is an integral part of the Constitution of BiH or not was constantly discussed at the sessions of the Constitutional Court on this case, and "swords were crossed" on the level of sophisticated theoretical-academic analyses. You will certainly find that in both the Decision and in the Separate Opinions by my colleagues.

I have already said that I would and I continue to simplify the answers to this question. Thus, the last line of the Preamble in the ORIGINAL reads: "RECALLING the Basic Principles agreed in Geneva on 8 September 1995 and in New York on 26 September 1995; Bosniacs, Croats, and Serbs, as constituent peoples (in community with Others), and the citizens of Bosnia and Herzegovina hereby determine that this Constitution of Bosnia and Herzegovina is as follows:"

Why did I note "in the ORIGINAL"?

I must confess that throughout this consideration, I as well as most other Judges SEPARATED THIS LINE INTO TWO. Namely, if you look above, you will see that it contains two paragraphs (one starting with RECALLING, and the other with Bosniacs).

However, the original of the Constitution is the first original that the Court received from the OHR, and it is quite clear in it that the first word of each line starts with BLOCK LETTERS. Thus the last line contains two paragraphs, which is even more apparent when the first paragraph ends with punctuation marks – full stop and semi-colon.

On the contrary, other printed constitutions also FAILED to provide a correct interpretation of the original.

You will see in the presentations of Judges that my "observations" are absolutely correct. For instance, Judge Hans Danelius, who voted *in favour*, submitted his Separate Opinion on his dissent regarding the opinion that this Preamble has a normative character. Therein, he analysed the challenged part of the Preamble in such a way so as to treat it only through the SECOND PARAGRAPH (sub-heading II: IN RELATION TO ARTICLE 1 OF THE CONSTITUTION OF RS). This is evident under (b).

It is absolutely clear that this second part of the Preamble (second paragraph) DOES NOT HAVE A NORMATIVE CHARACTER. It would be unnecessary to talk about what a norm is as lawyers know that very well, but for something to be a norm, it must first have a legal-normative expression which lays down a "rule of conduct". For a norm in its nature must determine, impose or restrict certain obligations.

ON THE CONTRARY, I would like to ask you again to read the second paragraph of the Preamble and you will draw from it the conclusion that it merely determines THOSE who adopted and proclaimed the Constitution of BiH. Bosniacs, Croats and Serbs are designated as constituent peoples in community with Others, but it determines that all of them passed the Constitution of BiH.

BUT it is neither evident nor indicated WHERE they are constituent. This means that there is definitely nothing else, save that it may be accepted that it was so written and that it is evident in Annex 2 to the Constitution »who the parties to the proceedings are«. So, this is merely a repetition of what was regulated at the end by Annex 2 – reference to parties to the proceedings.

Therefore, such wording of the said provision DOES NOT CONTAIN any legal norm that specific rights or obligations may arise from.

I have spoken of how the Court and I, however erroneously, focused on the second paragraph of the said indented line 9. (It has already been said that some constitutions gave an erroneous interpretation of the said line, and NOT as in the original supplied by the OHR.)

When I noted that the said part of the Preamble contained two paragraphs and that it was a single unit, I could have presented a different thesis. Namely, I could say that when RECALLING the General Principles agreed in Geneva on 8 September 1995, and in New York on 26 September 1995, one may say that the term »recalling« in fact means that the peoples listed in the second paragraph are reminded and it is RECOMMENDED to them that they should follow the said principles, which I have already discussed in this Separate Opinion.

If this is so, then one may discuss a "deeper meaning of this line" and say that it also indicates who is constituent where, for I used this in that part of the Opinion as an argument for my vote, linking events and General Principles from Geneva and New York with the adoption of the Dayton Agreement.

I would thus conclude that this "recommendation" and a "reminder" support even further my claim that there is NO DOUBT that the disputed issues of constitutionality are not in concurrence with the Decision. ON THE CONTRARY, one may conclude from the Preamble, provided both paragraphs are accepted, that it does precisely determine the same as determined by the Entities' Constitutions in relation to the constitutionality of peoples.

Analysis conducted so far has covered THE FIRST aspect of interpretation of the Preamble, which is also the most important one. THE SECOND aspect of this deliberation for any reasonably well educated lawyer is the issue *IN DUBIO* (disputability) of this part of the Preamble.

Can such a "decision of life-affecting importance" for the constituent peoples in BiH be adopted on the basis of such a "disputable" Preamble?

Such a Preamble, *in dubio* at the very least, should be considered in relation to the second paragraph when giving a proper interpretation based on the arguments I have elaborated upon in the "three phases" of events, and then the case would be, as I have already said, VERY SIMPLE. A logical interpretation of the Preamble, with all the above, should have linked it with the normative part of the Constitution, which has 12 Articles and 2 Annexes, and then see that what arises from the normative part of the Constitution of BiH is:

1) That the Constitution, which sets forth the government, judiciary and institutions at the level of BiH undoubtedly speaks of a TRIAD – a tripartite representation in the said authorities.

2) That the Federation of BiH PARTICIPATES with 2/3 of the power in this tripartite division, and the Republika Srpska PARTICIPATES with 1/3 of the power, or to put it better, representation (for one and the other).

3) This tripartite division stated under 2) is not a tripartite division by the Entities but on the national – and thus the CONSTITUENT character of government and representation.

This is evident from the following:

a) Article 4 of the Constitution of BiH, titled Parliamentary Assembly (the first Article that in sequence regulates the organisation of government).

Therein, under HOUSE OF PEOPLES, Item 1 states – I quote:

The House of Peoples shall have 15 delegates, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs).

It is therefore absolutely clear and beyond any doubt that this provision determines not only the tripartite division in the national, but also in the TERRITORIAL sense.

Furthermore, this means that only the members of the constituent peoples may be elected for this highest parliamentary body following a national key. The most important is that they may be elected from the "territory where they represent a CONSTITUENT NATIONAL CORPS".

The House of Representatives under 2), which comprises 42 members, follows the principle of 2/3 versus 1/3. There is a possibility for electing members of other peoples for this body.

b) Article V, titled Presidency. I quote the said provision: *The Presidency of Bosnia and Herzegovina shall consist of three members: one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska*.

To avoid repetition, "the same formula" is evident here as in elections for the HOUSE OF PEOPLES.

c) Article V, Item 4 titled Council of Ministers

This is what the said provisions sets forth under b), after elaborating the way of electing members to the Council of Ministers – I quote:
NO MORE THAN TWO-THIRDS OF ALL MINISTERS MAY BE APPOINTED from the territory of the Federation. The Chair shall also nominate Deputy Ministers (who shall not be of the same constituent people as their Ministers) who shall take office upon the approval of the House of Representatives.

Analysis of the said provision on one hand leads us to a conclusion that the same formula or the same key was used in relation to representation (2/3 vs. 1/3).

However, on the other hand, the CONSTUTENT PEOPLES are referred to for THE FIRST TIME with the election of Deputy Ministers, and it is obvious, when linked with the participation of power ratio, that these constituent peoples are Bosniacs and Croats from the Federation and Serbs from the Republika Srpska. I shall remind you here that during the implementation of the Court's Decision on the Council of Ministers some tried to deny the parity, among them the applicant in this case, despite the fact that this parity is undisputed in this provision.

d) Article VI, Item 1 titled CONSTITUTIONAL COURT:

Ratio-parity of Judges is the same as in the institutions I analysed earlier. Of domestic Judges, four are elected by the Parliament of the Federation of BiH and two by the Republika Srpska. Therefore, the formula is again 2/3 vs. 1/3.

There is indeed no mention here of national origin, but when one looks at Article IX, Item 13 titled General Provisions, it reads and I quote: *Officials appointed to positions in the institutions of Bosnia and Herzegovina shall generally reflect the composition of the peoples of Bosnia and Herzegovina*. So, again "the same story" and this was the way the Judges were elected.

e) Article VII, Item 2, titled Central Bank, states: The way of electing the Governing Board of the Central Bank, consisting of a Governor (foreign) and three members elected in the following way – I quote: *three members appointed by the Presidency, two from the Federation (one Bosniac and one Croat who shall share one vote) and one from the Republika Srpska*.

Hence, ONCE AGAIN the same formula of representation on a national key on one hand and territorial key on the other are being applied.

I think that it would be far too long to comment on this, for it is so evident and clear that I sometimes wonder why I had to give such long and extensive comments.

I have already said that the normative part of the Constitution of BiH and its analysis would explain the "unclear Preamble, paragraph 2 in particular", as that is the only possible option, since this is the part that sets forth obligations and rights. I have also said that a state's constitution is determined by "the power of the people". In this case it is the power, first of all, of the constituent peoples who determined the Constitution in its essence in Dayton, Ohio, USA, November 1-21, 1995, in a way as I have quoted and analysed. It is clear from the Constitution who the constituent peoples of BiH are and in what territory, as the Constitution of BiH clearly determined this "by reference".

These provisions are straightforward and undoubtedly indicate that there are three constituent peoples at the State level, and they are represented from the territory of two Entities since they are constituent peoples there. The parity of representation at the level of the State based on the 2/3 vs. 1/3 formula also arises from their constituent status.

I believe that once this Separate Opinion is linked to a whole through analytical, systematic and logical interpretation, I had no reason to dwell on how I should cast my vote.

So, I did not or we did not, as we are attacked by the media, and individuals, replace law with politics; on the contrary, such a campaign is a "switch of concepts".

During our proceedings, there were also considerations of "events taking place in the field".

There were suggestions to examine the situation on the ground, to examine discrimination on the ground, but most of all it was mentioned that "if all three peoples are not constituent in all of BiH", that prevents the return of refugees. This is an outline.

However, the right of each citizen – holder of citizenship of BiH – is the SAME RIGHT irrespective of nationality. Article II of the Constitution of BiH under the heading HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS prescribes very strictly a catalogue of these rights and obligations.

On the other hand, the right of refugees to return is also regulated in detail in Annex 7 to the Dayton Peace Agreement.

Therefore, the Dayton Peace Agreement, and the Constitution of BiH in particular, safeguards all rights – individual and other – of each citizen of BiH, irrespective of nationality.

I am not unfamiliar with the fact that these rights are often violated in everyday life and are not, unfortunately (at least for the time being), implemented as prescribed by the highest legal act – the Constitution of BiH.

However, as a Judge, I CANNOT alter the Constitution because of that, primarily as I am not a constitutional legislator; the main task of a Judge is to interpret the Constitution, laws and regulations, and thus to control them in accordance with the powers of this Constitutional Court.

Within his/her work, a Judge of the Constitutional Court does not have the power to be, for instance, an operative on the ground, a police officer or something similar.
I would like to offer a thought here, known in the history of many countries, that the Constitution, laws and regulations are ENFORCED BY THE GOVERNMENT, meaning that they are not enforced by the Constitutional Court. History of states illustrates that "good laws protected by constitutions" were often not well enforced by the governments on the ground.

To sum up, this cannot be the reason for the Constitution to be altered in the domain of this disputed issue. Another thing, I am not in favour of the "glorification of the rights of a citizen who is constituent versus a citizen who is not constituent", for the rights and freedoms of each citizen of BiH, as listed in the catalogue of rights, are protected IN AN IDENTICAL WAY.

Since the Decision does not contain two important aspects of procedure during sessions and public hearings, although the Editorial Board has been alerted to this, as a Judge I feel an obligation to elaborate on it as well. These issues must have been answered by the Decision.

1) The first public hearing was held in September 1998, and some of the parties to the proceedings failed to appear. Counsel and experts in support of the application, however, did appear. The applicant's counsel presented written and oral evidence on the proposals of the application.

In brief: the proposals were primarily directed toward examining the situation on the ground and statistical indicators.

In the presence of all the parties to the proceedings, at a public hearing in Banja Luka held on 23 January 1999, the counsel repeated these proposals and the Court dismissed them. As this was published, and it was I who did it while acting as the Chair of the Hearing, and since the position on this issue CHANGED (changed again) later and the Decision does not refer to that, it is my obligation to rationalise it.

Even after the end of the public hearing, where all the tendered evidence and proposals were dismissed together with the proposed evidence in writing by Judge Kasim Begić with a vote 7:2, the applicant's counsel proceeded with forwarding written proposals and statistical records of the same content as the dismissed proposed evidence.

Despite this, in his submissions (there were several) until the final pre-draft that followed as late as the end of December 1999 and the final Draft Decision, the Judge Rapporteur proceeded with the elaboration of the dismissed evidence.

I warned that an action contrary to the decision of the Court on the dismissal of the said evidence was a "contempt of the Court". However, this continued, and at the last session on deliberation and voting, there was a proposal to REPEAT the voting "on the same issue".

Interestingly enough, the position of the Court was "changed" – Judges voted 5:4 in favour of this evidence to be taken into consideration. This specific ratio of votes is interesting inasmuch as was used for manipulation by those who persist in insulting, attacking and threatening us relentlessly ever since the adoption of the Decision.

2) The Editorial Board requested that this Decision should note that the People's Assembly of the Republika Srpska had requested the exclusion of two Judges and that the requests were denied. Since the suggestions of the Editorial Board were not accepted, again I have an obligation to elaborate, for the same reason as before.

In our positive law, as it is known to any lawyer working either as a judge or a representative in legal matters, a request for the exclusion of a judge and a decision on such a request need to be elaborated upon, either in a separate document or in a final decision.

I am forced to elaborate upon this, so I will say the following:

a) In the spring of 1998, a request was submitted for the exclusion of Judge Joseph Marko, the Judge Rapporteur in this case, the reason being that he had taken part in the work of the Venice Commission, whose opinion I have already elaborated upon. The request was filed by the People's Assembly of the Republika Srpska in the capacity of a party to the proceedings.

b) Immediately prior to the session scheduled for 18 and 19 February 2000, a request was filed again for the exclusion of Judge Joseph Marko, and it was dismissed again (perhaps the party was unaware that the first request had been dismissed).

However, a request was received for the exclusion of the President of the Court, Prof. Dr. Kasim Begić, who participated as an expert in Dayton in the adoption of the Dayton Peace Agreement and who took part in the amendment procedure of the Constitutional Assembly of the Federation of BiH in the process of reconciling the Constitution of the Federation of BiH with the Constitution of BiH.

This request was dismissed as well.

It is interesting that the requests were for the exclusion of two Judges who had PREVIOUSLY had a position identical to that of the People's Assembly of the Republika Srpska as party to the proceedings.

This is not only interesting, but also "paradoxical". The reader may draw his/her own conclusions.

As I have said, since the parties to the proceedings received no reply and there was no explanation as to why the requests had been dismissed, they could do nothing but "think" about this issue. More so since I insisted on the obligation of entering this into the Decision, and when that was rejected, I said I would add this in a Separate Opinion.

It is beyond dispute that Mr. Joseph Marko did take part in the work of the Venice Commission as a member of the Expert Group, and that that group – the Venice Commission – elaborated the constitutionality in a way which is CONTRARY to the final vote of this Judge.

However, a more relevant question is can a person who took part in the interpretation of the Constitution of BiH in relation to the constitutionality decide later on the same issue as a Judge?

On the other hand, Prof. Dr. Kasim Begić had two aspects of his work concerning the Constitution of BiH, as follows:

a) He was an expert in the applicant's team in Dayton, and

b) He was Chair of the Constitutional-Legal Commission that suggested, in relation to the disputed issue, that Bosniacs and Croats were constituent in the Federation of BiH, meaning that Serbs are constituent in the Republika Srpska.

I have already elaborated on how this issue was resolved, i.e. the proposal of the said Commission was accepted unanimously.

So, there are two reasons. In our positive law, participation in the drafting of a contract DOES NOT LEAVE AN OPTION for such a person to be a judge in the same case, only a potential witness. That is all as far as Dayton is concerned.

I will not analyse the second reason, active participation in the amendment procedure at the BiH Assembly on 5 June 1996, as I have already dealt with that.

He was, at the same time, a member of Parliament, i.e. a person sworn to his duty, just like he is now, in the function he currently performs.

However, I will say that the issue is exactly the same, and as a person sworn in, he VOTED DIFFERENTLY on that issue.

This indeed needs no further comment save one: In the introduction I said, and I quote: “in relation to the procedural, first of all 'formal' decision, I have no objections”.

I said I would elaborate later, so I am doing that now: What I have analysed so far vis-à-vis the exclusion will or may leave a “shadow” hanging over the Decision of this Court.

This dilemma PUTS INTO QUESTION THE VALIDITY OF THIS DECISION.

As I have already said and elaborated upon, I would like to issue a reminder that the counsel and experts have CHANGED their position on the same issue. I offered an enigma of the impossibility of “two truths”, for there can only be one.

Unfortunately, this has also happened within the Court.

This Separate Opinion leads one to conclude that not only that I voted AGAINST the application, but I also qualified it as a REVISION of the Constitution of BiH, and thus of the Dayton Agreement.

I am aware of this qualification and, speaking in conditionals, »if I am right«, and I think I have provided sufficient arguments for that, I will say something on the conceivable consequences.

1) If all the three peoples are constituent in the territory of BiH, as the Decision reads, a "very difficult" question is then posed here. Is it possible that the Republika Srpska participates in power with only 1/3 at the level of the state of BiH?

If so, that would represent DISCRIMINATION of that Entity from the point of view of equality of the two Entities.

2) Or, to word it differently, a question arises if this could be called the creation of TWO Bosnias and Herzegovinas.

3) In further analogy, what follows is that this "prognosticates" the annulment of the Entities, which was also Mr. Michael Steiner's "prophecy".

In any event, this is what all the media and representatives of political parties have been taking about following the adoption of the Decision.

I do not want to dwell any more on the possible "evil consequences" in this part.

There is another important aspect I must point at.

I said in the introduction that the Decision brought the Constitution of BiH INTO NON-CONCURRENCE. It would be easy to adopt such a Decision if we were the legislators and if we were able to alter the normative part of the Constitution that I analysed and which dealt with the organisation of the state of BiH.

The Decision on the constitutionality of all three peoples in the territory of BiH places INTO CONTRADICTION the normative part of the Constitution of BiH. It is no longer logical and it becomes absurd, starting from the House of Peoples and onwards.

Will a Decision such as this one create "pressure" to alter the normative part of the Constitution?

I have already said that such a Decision AS AN EXPRESSION OF THE WILL OF THE PEOPLE may be taken only by the Parliament of the State of BiH, pursuant to the envisaged amendment procedure as referred to in Article X of the Constitution of BiH. This is a matter of vital national interest and that is why it required a consensus of the constituent peoples of BiH, however at the level of State Parliament.

I would thus like to end my elaboration of the factual and legal aspects of the Decision and of my personal position, with a note:

I voted as a Judge and not as a member of one people.

Mirko Zovko
Judge

of the Constitutional Court of Bosnia and Herzegovina